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Note: Out of the Ashes of the Cross: The Legacy of R.A.V. v. City of St. Paul

Jonathan M. Holdowsky*

* I dedicate this Note to my mother and father. I also dedicate this Note to those who bear the legacy born of torment, ridicule, discouragement, and shame--to the pain they feel in silence and to the strength they find to endure.

SUMMARY:
... For the first time, a majority of the United States Supreme Court said that a governmental body may not selectively proscribe expression that falls within a larger class of proscribable expression. ... As Justice Scalia pointed out, however, "'the emotive impact of speech on its audience is not a "secondary effect."'" ... Justice White authored a concurring opinion that read more like a dissent. ... Effectively, the T.B.D. II court asserted that the R.A.V. prohibition against content discrimination of proscribable expression only applied to the topic-oriented R.A.V.-Vawter class of statutes and not to the Sheldon-Ramsey-T.B.D. class of statutes, which targeted a specific kind of expressive conduct such as cross burning. ... Specifically, the R.A.V. Court provided that content-based regulations of proscribable expression are permissible "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." ... The California Supreme Court said that while the St. Paul ordinance clearly regulated expression, the California statute only regulated the conduct of willful interference that incorporated content-based expression within the "proscribable category of true threats." ...

TEXT:
[*1115]

"The decision . . . will surely confuse the lower courts." n1

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n1 R.A.V. v. City of St. Paul, 505 U.S. 377, 415 (1992) (White, J., concurring in the judgment).

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"In my view, determining how to apply . . . R.A.V. v. City of St. Paul, . . . is a difficult matter." n2

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n2 United States v. Hayward, 6 F.3d 1241, 1258 (7th Cir. 1993) (Flaum, J., concurring).

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I. Introduction

Few cases in recent years have confused the landscape of First Amendment jurisprudence more than R.A.V. v. City of St. Paul. n3 For the first time, a majority n4 of the United States Supreme Court said that a governmental body may not selectively proscribe expression that falls within a larger class of proscribable expression. n5 The Court noted, however, that such content-based discrimination is permissible when it falls within certain exceptions. n6 The R.A.V. concurring minority n7 and a number of commentators n8 argued that the R.A.V. general rule and its [*1116] "nonexhaustive list of ad hoc exceptions" n9 would lead to an array of convoluted and unpredictable judicial applications in federal and state courts. n10 They further argued that, although the R.A.V. majority opinion struck down a hate-crime statute that proscribed a sub-class of fighting words, n11 the R.A.V. ruling would reach other kinds of statutes and other forms of expression that traditionally fall outside the purview of First Amendment protection. n12

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n3 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

n4 The R.A.V. Court was unanimous in the judgment. Id. at 378. Only five justices, however, supported the Court's opinion, which was written by Justice Scalia. Id.; see also infra part III.B. Justices White, Blackmun, O'Connor, while concurring in the judgment, R.A.V., 505 U.S. at 397 (White, J., concurring in the judgment), sharply differed with the majority's rationale. See id. at 397-414 (White, J., concurring in the judgment); see also infra part III.C. Justice Stevens, for the most part, agreed with the minority opinion, although he wrote a separate concurring opinion as well. R.A.V., 505 U.S. at 416 (Stevens, J., concurring in the judgment); see also infra part III.D.

n5 See generally R.A.V., 505 U.S. at 379-96. For a discussion of proscribable classes of expression, see infra notes 24-34 and accompanying text.

n6 For a discussion of the R.A.V. exceptions, see infra notes 96-110 and accompanying text. The R.A.V. Court noted that the statute in question fell within none of the exceptions. R.A.V., 505 U.S. at 393-95.

n7 See supra note 4.

n8 For a partial list of critical assessments concerning the R.A.V. decision, see infra notes 179-80, 183.

n9 Id. at 407 (White, J., concurring in the judgment).

n10 See R.A.V., 505 U.S. at 407-09 (White, J., concurring in the judgment); id. at 415 (Blackmun, J., concurring in the judgment).

n11 The fighting words doctrine was first articulated in Chaplinsky v. New Hampshire, 315 U.S. 568, 570-72 (1942). Such words, the Chaplinsky Court held, did not merit First Amendment protection. Id. at 571. See infra part II.B.1-2 for a discussion of Chaplinsky and its progeny.

n12 See R.A.V., 505 U.S. at 407 (White, J., concurring in the judgment) ("Today's decision would call into question the constitutionality of the statute making it illegal to threaten the life of the President."). See infra notes 24-34 for a discussion of the proscribable classes of expression.

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This Note examines the R.A.V. holding and the legacy that it has engendered. Part II discusses the evolution of First Amendment jurisprudence with particular emphasis on the fighting words doctrine. n13 Part III discusses R.A.V., both the majority and concurring minority opinions. n14 Part IV assesses the R.A.V. legacy. n15 Part IV.B examines R.A.V.'s effect upon hate-crime legislation regulating expression. n16 Part IV.C analyzes the impact of R.A.V. within the context of penalty enhancement statutes. n17 Part IV.D provides an overview of R.A.V. within other post-R.A.V. contexts. n18 Part V offers a brief conclusion. n19

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n13 See infra notes 20-74 and accompanying text.

n14 See infra notes 75-176 and accompanying text.

n15 See infra notes 177-384 and accompanying text.

n16 See infra notes 189-319 and accompanying text.

n17 See infra notes 320-39 and accompanying text.

n18 See infra notes 340-84 and accompanying text.

n19 See infra notes 385-95 and accompanying text.

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II. The First Amendment and the Doctrine of Proscribable Expression

A. Background

The First Amendment expressly provides that "Congress shall make no law . . . abridging the freedom of speech." n20 Few constitutional [*1117] rights are protected with as much zeal as freedom of expression. n21 Any [*1118] government regulation that restricts the content of speech n22 --that is, a content-based regulation--generally receives the highest form of judicial scrutiny. n23 The government may, however, restrict the content of cer [*1119] tain categories of speech that are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." n24 The United States Supreme Court has "recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard the traditional limitations [of order and morality]." n25 Categories of speech that are excluded from total First Amendment protection and, thus, permissibly subject to regulation, include obscenity, n26 defamation, n27 child pornography, n28 advocacy of imminent illegal conduct, n29 threats, n30 and fighting words. n31 The Supreme Court has never formu [*1120] lated precise guidelines in

determining whether a type of speech should be categorically excluded from First Amendment protection. n32 Once the Court deems a category of speech unworthy of First Amendment protection, it does not do so irrevocably, as the Court has afforded a degree of protection to previously unprotected categories, n33 and has refined the definitional scope of others. n34

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n20 U.S. Const. amend. I. The United States Supreme Court in Gitlow v. New York, 268 U.S. 652, 666 (1925), held that the free speech provisions of the First Amendment were applicable to the states.

n21 In Palko v. Connecticut, 302 U.S. 319, 327 (1937), for example, the Court proclaimed freedom of expression as "the matrix, the indispensable condition of nearly every other form of freedom." The framers' historical intent in this regard is ambiguous. See generally Kent Greenawalt, Insults and Epithets: Are They Protected Speech?, 42 Rutgers L. Rev. 287 (1990). Commentators, however, have developed a series of philosophical rationales for the relative immunity that free expression enjoys. The first such rationale advances that expression of ideas should be unencumbered by regulation because "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The United States Supreme Court has widely adopted this so-called "marketplace of ideas" philosophy. See generally Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Keyishian v. Board of Regents, 385 U.S. 589 (1967). Still, critics have argued that the marketplace theory unrealistically presumes the inevitable rationality of expression. See generally C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978). Others have contended that the philosophical economic underpinning of the marketplace theory--the greatest social benefit flows from the least regulation--is, itself, suspect. See generally Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1.

One scholar suggested a second rationale for freedom of expression. See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 2427, 39 (1948). He posited that the aim of the First Amendment's provision for free expression is rooted in the means provided by such uncensored expression in achieving societal self-governance. Id.

The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction . . . that public issues shall be decided by universal suffrage.

. . . .

. . . The limited guarantee of the freedom of a man's wish to speak is radically different in intent from the unlimited guarantee of the freedom of public discussion, which is given by the First Amendment. . . . [The latter protects the speech] of a citizen who is planning for the general welfare.

Id. at 26-27, 39. Some critics assail the narrow political foundation on which Meiklejohn based his rationale. See generally Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982).

A third rationale suggests that freedom of expression is essential in order for the individual and, thus, society to achieve self-fulfillment. For various manifestations of the self-fulfillment rationale, see David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204 (1972).

Among other, less widely recognized, rationales is one which advances the notion that free expression provides a check against the abuse of official power. See generally Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521. Another rationale posits that free speech serves as a "safety valve," and thereby promotes social stability. See generally T. Emerson, The System of Freedom of Expression (1970). Still another among this group of secondary rationales considers free speech as the hallmark of a tolerant society. See generally Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (1986).

n22 Speech is not restricted to verbal expression. The United States Supreme Court has a strong tradition of affording First Amendment protection to expressive conduct or symbolic speech. See Stromberg v. California, 283 U.S. 359, 368-70 (1931) (holding that the display of a red flag is protected speech). Recently, the Court afforded similar protection to the burning of the American flag. See, e.g., United States v. Eichman, 496 U.S. 310, 317-18 (1990); Texas v. Johnson, 491 U.S. 397, 418-20 (1989). Other examples of protected expressive conduct include Clark v. Community for Creative Non-Violence, 468 U.S. 288, 290 (1984) (sleeping overnight on public grounds); Schacht v. United States, 398 U.S. 58, 60-63 (1970) (wearing of a military uniform); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (wearing of a black armband).

In granting First Amendment protection to expressive conduct, the Court has steadfastly included performance in such forms as outdoor rock concerts and motion pictures. See Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); Southeastern Promotions v. Conrad, 420 U.S. 546, 558 (1975); Jenkins v. Georgia, 418 U.S. 153, 161 (1974). The Court has also said that "sexual expression which is indecent but not obscene is protected by the First Amendment." Sable Communications v. FCC, 492 U.S. 115, 126 (1989). In this regard, the Court has afforded First Amendment protection to non-obscene nude dancing. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991).

Although the Supreme Court grants some First Amendment protection to expressive conduct, it does not necessarily follow that such conduct garners the same level of protection enjoyed by verbal expression. To this end, the Barnes Court said that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment." Barnes, 501 U.S. at 566 (emphasis added); see also Johnson, 491 U.S. at 406 (suggesting that government has a "freer hand" in regulating expressive conduct than verbal expression (citing City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989); Clark v. Community for Creative NonViolence, 468 U.S. 288, 293 (1984); United States v.

O'Brien, 391 U.S. 367, 376-77 (1967))).

In assessing whether a particular type of conduct carries an aspect of expression, the Court has used a standard first articulated in Spence v. Washington, 418 U.S. 405 (1974), and ultimately crystallized in Johnson, 491 U.S. at 404. Specifically, the Court has asked whether "'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" Johnson, 491 U.S. at 404 (alterations in original) (quoting Spence, 418 U.S. at 410-11).

n23 The strict scrutiny doctrine, in the First Amendment context, holds that when a government interferes, even slightly, with the content of a message, that government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Widmar v. Vincent, 454 U.S. 263, 270 (1981) (footnote omitted) (citing Carey v. Brown, 447 U.S. 455, 461, 46465 (1980)); see also Police Dep't v. Mosley, 408 U.S. 92 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940). A content-based regulation will not be considered sufficiently narrowly drawn if the government has less restrictive means available to achieve its compelling state interest. See, e.g., Boos v. Barry, 485 U.S. 312, 328-29 (1988). Although strict scrutiny is generally fatal to content-based regulations, a recent exception to this notion occurred in Burson v. Freeman, 504 U.S. 191 (1992). In Burson, the Court upheld a total ban of electioneering within 100 feet of polling places. Id. at 211.

n24 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (footnote omitted). Such classes of expression are "not within the area of constitutionally protected speech." Roth v. United States, 354 U.S. 476, 483 (1957) (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)); see also infra notes 26-31 and accompanying text.

n25 R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (citing Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring); Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)). The Court has, more generally, maintained that freedom of expression is not absolute. See generally Konigsberg v. State Bar, 366 U.S. 36 (1961); Terminiello v. Chicago, 337 U.S. 1 (1949); Chaplinsky v. New Hampshire 315 U.S. 568 (1942).

n26 Roth, 354 U.S. at 476; see also Miller v. California, 413 U.S. 15, 20-23 (1973).

n27 Beauharnais, 343 U.S. at 266 (holding that libelous utterances are not "within the area of constitutionally protected speech"). The United States Supreme Court, in cases decided after Beauharnais, narrowed the scope of regulations of defamatory statements. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 354 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 283-92 (1964).

n28 New York v. Ferber, 458 U.S. 747, 765-66 (1982) (upholding the validity of a state statute that proscribed the depiction of minors engaged in the live presentation of non-obscene sexual acts).

n29 Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding invalid a state statute that punished mere advocacy of violence without imminent likelihood

that such violence would occur).

n30 Watts v. United States, 394 U.S. 705, 705 (1969) (affirming facial validity of a statute that proscribed threats only against the President of the United States).

n31 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The United States Supreme Court defined fighting words as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. (footnote omitted).

n32 See, e.g., Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 1. Professor Kalven discusses his "two-level" theory of speech in which speech is either "protected" or "unprotected" depending upon the particular value system of the Court at the time. Id. at 10.

n33 For example, in 1942, the Supreme Court excluded purely commercial speech from First Amendment protection. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). In 1976, however, the Court abandoned this holding and ruled that even purely commercial speech deserves some intermediate level of First Amendment protection. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 770-73 (1976).

In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980), the Court articulated a four-pronged test of intermediate scrutiny that a governmental entity must satisfy in order to regulate commercial expression. First, the commercial expression must refer to lawful activity and not be misleading. Id. at 563-64. Second, the governmental entity must establish a substantial interest in regulating the commercial expression, and the regulation "must be in proportion to that interest." Id. at 564. Third, the regulation must directly advance the asserted governmental interest. Id. Finally, "the restriction must directly advance the state interest involved and . . . if the government interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive." Id.; see also R.A.V. v. City of St. Paul, 505 U.S. 377, 427-28 (1992) (Stevens, J., concurring in the judgment).

n34 See infra part II.B.2.

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The United States Supreme Court has established that content-based regulations of protected expression, such as political speech, are presumptively invalid and subject to a strict scrutiny analysis. n35 Prior to R.A.V., the Court had never ruled on the presumptive invalidity of content-based regulations that fall exclusively within the context of an un [*1121] protected category of expression. n36 In R.A.V., the Court considered content discrimination that involved the unprotected category of fighting words. n37

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n35 See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 122-23 (1991); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543-44 (1980); see also supra note 23 and accompanying text.

n36 R.A.V., 505 U.S. at 386-87 n.5. "[Justice White] cites not a single case (and we are aware of none) that even involved, much less considered and resolved, the issue of content discrimination through regulation of 'unprotected' speech." Id.

n37 See infra part III.

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B. The Fighting Words Doctrine

1. Chaplinsky v. New Hampshire n38

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n38 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

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The United States Supreme Court first articulated the fighting words doctrine in Chaplinsky v. New Hampshire. n39 In Chaplinsky, the defendant distributed literature about Jehovah's Witnesses on a New Hampshire street corner as he verbally assailed "all religion." n40 He was charged with violating chapter 378, section 2, of the Public Laws of New Hampshire, which proscribed the use of offensive language against individuals in public places. n41 Chaplinsky was found guilty in the municipal and superior courts, and his conviction was upheld by the New Hampshire Supreme Court. n42

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n39 Id. at 571.

n40 Id. at 570. The defendant was a member of the Jehovah's Witness religion. Id. at 569. According to the original complaint, Chaplinsky said to passersby, including police officers, "You are a God damned racketeer . . '. a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Id. Chaplinsky acknowledged that he made these statements "with the exception of the name of the Deity." Id.

n41 Id. at 569. The whole of the statute read as follows:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. (quoting Pub. Laws of N.H. ch. 378, section 2).

n42 Id.

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Chaplinsky challenged the New Hampshire statute on the grounds that it violated his First Amendment rights of freedom of speech, the press, and worship. n43 A unanimous United States Supreme Court immediately dismissed his attacks as they related to his rights of freedom of the press and freedom to worship. n44 In addressing Chaplinsky's attack [*1122] on free speech grounds, the Court first stated that "the right of free speech is not absolute at all times and under all circumstances." n45 Among those categories of speech that did not merit absolute First Amendment protection were "'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." n46 The Court accepted the New Hampshire Supreme Court's statutory interpretation that the term "'"offensive" was not to be defined in terms of what a particular addressee thought. . . . The test is what men of common intelligence . . . understand . . . .'" n47 "The limited scope of the statute as . . . construed [does not] contravene[] the Constitutional right of free expression." n48 In affirming the New Hampshire Supreme Court's conviction, the Chaplinsky Court concluded that the statute was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." n49

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n43 Chaplinsky, 315 U.S. at 571.

n44 Id. ("The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term.").

n45 Id. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Id. at 571-72 (footnote omitted).

n46 Id. at 572 (footnote omitted). "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. (footnote omitted).

n47 Id. at 573 (third alteration in original) (quoting Chaplinsky v. New Hampshire, 18 A.2d 754, 762 (1941)).

n48 Chaplinsky, 315 U.S. at 573.

n49 Id. (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); Thornhill v. Alabama, 310 U.S. 88, 105 (1940)).

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2. Fighting Words After Chaplinsky

The fighting words doctrine that the Chaplinsky Court formulated carried with it two prongs. Specifically, fighting words were those "which by their very utterance either [1] inflict injury or [2] tend to incite an immediate breach

of the peace." n50 The Court has neither upheld any regulations of speech based on the injury prong, nor given a precise meaning to the kind of injury it requires. n51 The Court, there [*1123] fore, only referred to the second prong in considering subsequent cases that evoked the fighting words doctrine. n52

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n50 Id. at 572.

n51 See Victoria L. Handler, Legislating Social Tolerance: Hate Crimes and the First Amendment, 13 Hamline J. Pub. L. & Pol'y 137, 147 (1992). Some commentators thus believe that the injury prong is no longer viable. See generally Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 480; Note, The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment, 106 Harv. L. Rev. 1129, 1137-40 (1993) [hereinafter Note, The Demise of the Chaplinsky Fighting Words Doctrine]; see also Cohen v. California, 403 U.S. 15, 26 (1971) (rejecting the State's assertion that Cohen's use of profane language amounted to injurious fighting words notwithstanding the absence of any audience reaction). Still, the Court has never definitively overruled the injury prong. See Note, The Demise of the Chaplinsky Fighting Words Doctrine, supra, at 1138. As such, advocates of the injury prong maintain that, in certain egregious circumstances, its use is appropriate. See, e.g., Rosenfeld v. New Jersey, 408 U.S. 901, 906 (1972) (Powell, J., dissenting) ("A verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription . . . .").

n52 See Strossen, supra note 51, at 509-10.

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In 1949, only seven years after Chaplinsky, the Court refined the fighting words doctrine in Terminiello v. Chicago. n53 In Terminiello, the defendant made a speech in which he referred to his audience as "slimy scum," n54 "snakes," n55 and "atheistic communistic Jews." n56 Terminiello was charged and convicted under the local breach-of-thepeace statute, chapter 1939, section 193-1 of the Municipal Code of Chicago. n57 The trial court instructed the jury that it could convict the defendant if it found that Terminiello's language "'stirred the public to anger, invited dispute, brought about a condition of unrest, or created a disturbance.'" n58 Without addressing whether Terminiello's words constituted fighting words, the United States Supreme Court found that the statute was overbroad n59 in that it not only reached the [*1124] permissibly regulable fighting words, but it also reached words that cause anger or dispute as well. n60 Such words, the Court reasoned, were well within the purview of political free speech. n61 Most notably, the Terminiello Court advanced the proposition that mere offensiveness did not make words proscribable under the Chaplinsky doctrine. n62 "Freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." n63 This "clear and present danger" standard appeared to extend beyond those words which merely "tend to incite an immediate breach of the peace." n64 Thus, a [*1125] sensitive or easily offended audience would not be granted what amounted to a "heckler's veto." n65

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n53 Terminiello v. Chicago, 337 U.S. 1 (1949); see also supra notes 33-34 and accompanying text (discussing how the Court has shown a willingness to change the status of "excluded" categories).

n54 Terminiello, 337 U.S. at 17 (Jackson, J., dissenting).

n55 Id. at 21 (Jackson, J., dissenting).

n56 Id. at 20 (Jackson, J., dissenting).

n57 Id. at 2. The statute read as follows:

> All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.

Id. at 1 n.1 (omission in original) (quoting Chicago, Ill., Municipal Code section 193-1 (1939)).

n58 Id. at 4 (quoting the trial judge's instructions to the jury).

n59 Terminiello, 337 U.S. at 4-5. Overbreadth is a major First Amendment doctrine which holds that constitutionally regulable activities may not be so regulated by legislation "'which sweeps unnecessarily broadly and thereby invades the area of protected [First Amendment] freedoms.'" Zwickler v. Koota, 389 U.S. 241, 250 (1967) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)). In order for a statute to be overbroad, it must "sweep[] within its prohibitions what may not be punished under the First . . . Amendment[]." Grayned v. City of Rockford, 408 U.S. 104, 115 (1972). The overbreadth also must be "real and substantial [when it is] judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Such overbreadth effectively chills the exercise of free speech in intimidating people not to speak even though they would ultimately prevail in court. An overbroad statute "hangs over [people's] heads like a sword of Damocles." Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

n60 Terminiello, 337 U.S. at 5.

n61 Id. at 4. "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Id. at 5. Terminiello's conviction was reversed even though he might have been convicted under a more narrowly drawn statute. Id. at 6.

n62 See id. at 4.

n63 Id. (citing Craig v. Harney, 331 U.S. 367, 373 (1947); Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942); Bridges v. California, 314 U.S. 252, 262 (1941)).

n64 Chaplinsky, 315 U.S. at 572 (footnote omitted). The Terminiello Court gave a contextual gloss over the fighting words doctrine in which the totality of the circumstances was to be considered, and not merely the nature of the words themselves as the Chaplinsky Court had suggested. See Terminiello, 339 U.S. at 4-5; see also Laurence H. Tribe, American Constitutional Law section 12-10, at 850 (2d ed. 1988) (positing that the Chaplinsky doctrine concerned the expression's content, not the context within which it was offered); Mark A. Rabinowitz, Nazis in Skokie: Fighting Words or Heckler's Veto?, 28 DePaul L. Rev. 259, 264 (1979). Only one case followed Chaplinsky using this modified "clear and present danger" standard. See Feiner v. New York, 340 U.S. 315, 320-21 (1951). In Feiner, the petitioner had made a speech which included disparaging comments about President Truman, the American Legion, and others. Id. at 317. As the crowd threatened to attack the speaker, the police intervened and arrested the speaker under a state disorderly conduct statute. Id. at 318. A five-to-four Court upheld the conviction of the petitioner asserting that the petitioner's conduct was tantamount to an incitement to riot. Id. at 321. "Ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker . . . . [However,] the speaker passed the bounds of argument or persuasion and undertook incitement to riot . . . ." Id. at 320-21 (citation omitted).

In his dissent, Justice Black maintained, that as a matter of law, before the police may interfere with a speaker who is engaged in lawful expression, they must make "all reasonable efforts to protect him"--a requirement that the Feiner majority did not articulate. Id. at 326 (Black, J., dissenting) (footnote omitted). Commentators believe that Feiner would be read quite narrowly today. See Tribe, supra, section 12-10, at 855.

n65 See Harry Kalven, Jr., The Negro and the First Amendment 140-45 (1965); see also Rabinowitz, supra note 64, at 274.

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In subsequent fighting words cases, the Court reaffirmed the notion that merely offensive language is protected. n66 Indeed, some commentators have suggested that the Chaplinsky progeny of cases have tempered the original fighting words doctrine to the extent that it is only applicable to virulent language within a direct personal encounter incorporating the totality of the circumstances. n67 Others suggest that the Chaplinsky standard reflects a gender-biased mindset. n68 Still others believe that Chaplinsky, even in a weakened guise, countenances violence as a permissible reaction to verbal assault and that, in itself, is morally wrong. n69 Some commentators simply fear that the fighting words doctrine gives cover to governmental authorities to censor unpopular view [*1126] points. n70 In the last analysis, however, the most telling reflection on Chaplinsky may have emanated from within the Court itself: "The Court . . . is merely paying lip service to Chaplinsky." n71

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n66 See, e.g., City of Houston v. Hill, 482 U.S. 451, 462 (1987) ("The Constitution does not allow such insulting speech to be made a crime." (footnote omitted)); Gooding v. Wilson, 405 U.S. 518, 528 (1972) (striking down a Georgia statute on overbreadth grounds because it proscribed language that was merely insulting); Cohen v. California, 403 U.S. 15, 22-26 (1971) (holding that absent an intent to incite illegal conduct, the use of profane language is not per se excisible from political discourse); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

n67 See Stephen W. Gard, Fighting Words As Free Speech, 58 Wash. U. L.Q. 531, 536 (1980) ("[The Chaplinsky doctrine is] nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression."); Thomas F. Shea, "Don't Bother to Smile When You Call Me That"--Fighting Words and the First Amendment, 63 Ky. L.J. 1, 1-2 (1975) (concluding that the Supreme Court has afforded fighting words the mantle of First Amendment protection).

n68 See Kathleen M. Sullivan, The First Amendment Wars, New Republic, Sept. 28, 1992, at 35, 40 (advancing the idea that violence in response to personal insult is a particularly male-oriented characteristic).

n69 See, e.g., Sean M. SeLegue, Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment, 79 Cal. L. Rev. 919, 933-34 (1991).

n70 See, e.g., Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 474 (1985).

n71 Gooding v. Wilson, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting).

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Although the Supreme Court has vitiated the original Chaplinsky doctrine, it has never explicitly overturned it. n72 In this regard, against a backdrop of increasing societal tensions in general, and hate-motivated crimes in particular, n73 various legislative and educational bodies enacted hate-crime statutes and codes that were predicated on the Chaplinsky fighting words exception. n74 The government of the City of St. Paul, Minnesota was one such legislative body.

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n72 See Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 437 n.29 ("The Court has yet to reject . . . Chaplinsky . . . .").

n73 See, e.g., State v. Mitchell, 485 N.W.2d 807, 810 (Wis.) (substantiating the manner in which hate-motivated crime has burgeoned in the twentieth century), cert. granted, 506 U.S. 1033 (1992), and rev'd, 508 U.S. 476 (1993); see also Lawrence III, supra note 72, at 431-44 (characterizing racially motivated hate crimes on campus in recent years); see generally, Anti-Defamation League, Hate Crimes Laws: A Comprehensive Guide (1994) [hereinafter Hate Crimes Laws].

n74 See, e.g., Lawrence III, supra note 72, at 449-57; see also infra part IV.

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III. R.A.V. v. City of St. Paul n75

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n75 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

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A. Facts of the Case

On June 21, 1990, the petitioner n76 constructed a cross from wooden chair legs. n77 He and others burned the cross on the front lawn of a black family that lived across the street from the petitioner. n78 The petitioner was charged under the St. Paul Bias-Motivated Crime Ordinance. n79 The trial court granted the petitioner's motion to dismiss on [*1127] grounds that "the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment." n80 The Minnesota Supreme Court reversed by limiting the reach of the St. Paul statute only to "'fighting words' . . . 'conduct that itself inflicts injury or tends to incite immediate violence.'" n81 The Minnesota court also stated that the ordinance survived the application of strict scrutiny. n82 In a unanimous decision, the United States Supreme Court reversed. n83

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n76 Then a minor, the petitioner went through the judicial process known only by his initials--R.A.V. See Edward J. Cleary, Beyond the Burning Cross: The First Amendment and the Landmark R.A.V. Case 4 (1994).

n77 R.A.V., 505 U.S. at 379.

n78 Id.

n79 Id. at 380. The ordinance, St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Leg. Code section 292.02 (1990), read as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380 (quoting St. Paul, Minn., Leg. Code section 292.02 (1990)).

The petitioner was also charged with a violation of the Minnesota delinquency statute which he did not challenge. Id. at 380 n.2. The United States Supreme Court made a point of stating that the petitioner could have been charged under a number of conduct-based arson and other criminal laws. Id. at 379-80.

n80 R.A.V., 505 U.S. at 380 (footnote omitted).

n81 Id. (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn.) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)), cert. granted sub nom. R.A.V. v. City of St. Paul, 501 U.S. 1204 (1991), and rev'd, 505 U.S. 377 (1992)). In so constructing the statute, the Minnesota Supreme Court looked to the ordinance's modifying emotive language: "'arouses anger, alarm or resentment in others.'" Id. (quoting In re Welfare of R.A.V., 464 N.W.2d at 510).

n82 See id. at 381 ("'The ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.'" (quoting In re Welfare of R.A.V., 464 N.W.2d at 511)).

n83 See supra note 4 for the majority/minority breakdown of the Justices' majority and concurring opinions.

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B. The Majority Opinion

Writing for the majority, n84 Justice Scalia accepted the Minnesota Supreme Court's interpretation of the statute as only reaching the unprotected class of expression called "fighting words" within the meaning of Chaplinsky. n85 Justice Scalia said, however, that such words are not "categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." n86 In this regard, Justice Scalia said that although a "government may proscribe libel; . . . it may not . . . [*1128] proscribe only libel critical of the government." n87 Such selectivity, in the majority's view, would amount to a form of content discrimination. n88

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n84 The majority consisted of Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas. R.A.V., 505 U.S. at 378.

n85 Id. at 381 ("We are bound by the construction given to [the statute] by the Minnesota court." (citing Posados de Puerto Rico Ass'n v. Tourism of Puerto Rico, 478 U.S. 328, 339 (1986); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); Terminiello v. Chicago, 337 U.S. 1, 4 (1949))).

n86 Id. at 383-84.

n87 Id. at 384.

n88 Id.

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"We have not said that [fighting words] constitute 'no part of the expression of ideas' . . . only . . . 'no essential part . . . .'" n89 In this regard, Justice Scalia likened the totality of fighting words to a "noisy sound truck." n90 "Each is . . . a 'mode of speech' . . . both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment." n91 Just as the noise emitted by a sound truck is recognized as a non-speech element of the expression conveyed by the sound truck, n92 so too, "the unprotected features of fighting words are, despite their verbal character, . . . a 'non-speech' element of communication." n93 It is these "non-speech" elements of expression that may be reached by "time, place, or manner restrictions . . . [provided that such restrictions] 'are justified without reference to the content of the regulated speech.'" n94 Thus, a government statute may properly regulate the [*1129] loudness of a sound truck, or the time of day it may operate, just as it may regulate the unprotected features of fighting words, provided "the government . . . does not so regulate . . . based on hostility--or favoritism--towards the underlying message expressed." n95

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n89 R.A.V., 505 U.S. at 385 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

n90 Id. at 386. A sound truck is "a vehicle . . . having one or more loudspeakers, usually on top, for area broadcasting." Webster's II New Riverside University Dictionary 1111 (1984).

n91 R.A.V., 505 U.S. at 386 (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

n92 See generally Kovacs v. Cooper, 336 U.S. 77 (1949).

n93 R.A.V., 505 U.S. at 386.

n94 Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Constitutional time, place, or manner restrictions on expression are designed to regulate qualitative, non-communicative aspects of expression, such as loudness, brightness, and access to public facilities. Such restrictions must be content-neutral and, therefore, "'justified without reference to the content of the regulated speech.'" Ward, 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Such restrictions must be "narrowly tailored to serve a significant governmental interest." Clark, 468 U.S. at 293. The government must also "'leave open ample alternative channels for communication of the information.'" Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

Where expressive conduct is the subject of government regulation, the Court uses a test articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), to determine whether the regulation is content-neutral. The four-pronged O'Brien test specifies the following:

A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.; see also Clark, 468 U.S. at 298-99 (observing that the test to examine the content neutrality of regulations on verbal speech is virtually the same as the test for expressive conduct articulated in O'Brien).

n95 R.A.V., 505 U.S. at 386. Again, such content-neutral regulations must be made "'without reference to the content of the regulated speech.'" Ward, 491 U.S. at 791 (quoting Clark, 468 U.S. at 293). A government regulation that proscribed the use of all sound trucks between midnight and 6 a.m. would be permissible because it is content-neutral. A government regulation that proscribed sound trucks that emitted a distinctly anti-government message between midnight and 6 a.m. would not be permissible because it is a content-based time, place, or manner restriction and shows "hostility . . . towards the underlying message expressed." R.A.V., 505 U.S. at 386; see also Frisby v. Schultz, 487 U.S. 474, 487-88 (1988) (upholding a content-neutral proscription on targeted residential picketing); Carey v. Brown, 447 U.S. 455, 470-71 (1980) (striking down a proscription on residential picketing that exempted organized union picketing).

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Justice Scalia further stated that the "rationale of the general prohibition [against content discrimination] . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" n96 "But content discrimination among various instances of a class of proscribable speech often does not pose this threat." n97 Thus, Justice Scalia asserted that there were circumstances in which the government could engage in contentbased discrimination when the regulated speech fell within a larger class of proscribable speech. n98

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n96 R.A.V., 505 U.S. at 387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 448 (1991); FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95-98 (1972))).

n97 Id. at 388. "Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech." Id. at 387.

n98 Id. at 387-88.

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The first such circumstance occurs, according to the Court, "when the basis for the content discrimination consists entirely of the very [*1130] reason the entire class of speech at issue is proscribable." n99 To illustrate, Justice Scalia maintained that a government may choose to regulate particularly offensive types of obscenity. n100 "But [the government] may not prohibit . . . only that obscenity which includes offensive political messages." n101 "The Federal Government can criminalize only those threats of violence that are directed against the President . . . [because such threats] have special force when applied to the person of the President." n102 "But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities." n103

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n99 Id. at 388.

n100 Id.

n101 R.A.V., 505 U.S. at 388 (citing Kucharek v. Hamaway, 902 F.2d 513, 517 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991)). Such a regulation would be impermissible because it discriminates on the basis of the message such obscenity conveys; that is, it is impermissibly content-based. Kucharek, 902 F.2d at 517-18.

n102 R.A.V., 505 U.S. at 388 (citing Watts v. United States, 394 U.S. 705, 707 (1969)). Threats of violence are generally outside the protection of the First Amendment because of the public interest in "protecting individuals from the fear of violence, from the disruption that fear engenders; and from the possibility that the threatened violence will occur." Id. Regarding threats exclusively against the President of the United States, Justice Scalia referred to 18 U.S.C. section 871 (1991). R.A.V., 505 U.S. at 388; see also Watts v. United States, 394 U.S. 705, 708 (1969) (upholding facial validity of section 871(a)).

n103 R.A.V., 505 U.S. at 388 (emphasis added).

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A second circumstance in which a government may proscribe a subclass of a larger, unprotected class of expression is if "the subclass happens to be associated with particular 'secondary effects' of the speech." n104 As an example of this "secondary effects" exception, Justice Scalia noted that a state regulation could "permit all obscene live performances except those involving minors." n105

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n104 Id. at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986)).

n105 Id. The "secondary effects" exception implies that the object of the regulation is not to suppress expression, but to control undesirable consequences of the proscribed expression such as, in Justice Scalia's example, corrupting the morals of a minor. See Renton, 475 U.S. at 43 (upholding a zoning ordinance that required all adult theatres to be at least 1000 feet from a

residential area, church, school, or park). The Renton Court said that the zoning ordinance was not designed to suppress expression, but rather to control the secondary effects that accompany such adult establishments, including lower property values and higher crime rates. Id. at 47-48.

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Justice Scalia implied that a third exception to the larger R.A.V. rule occurs when "a particular content-based subcategory of a proscribable class of speech . . . is swept-up incidentally within the reach of a statute directed at conduct rather than speech." n106 Justice Scalia noted, [*1131] for example, that "Title VII's general prohibition against sexual discrimination in employment practices" may include incidental regulation of certain "sexually derogatory 'fighting words.'" n107 "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." n108

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n106 R.A.V., 505 U.S. at 389 (emphasis added) (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991) (plurality opinion); Barnes, 501 U.S. at 577 (Scalia, J., concurring); Barnes, 501 U.S. at 582 (Souter, J., concurring); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425-32 (1990); United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). This exception may be viewed as the corollary to the O'Brien test, which gauged whether a statute regulating conduct with expressive elements was sufficiently content-neutral in design. See supra note 94. This third exception effectively allows a statute that exclusively regulates conduct to reach or "sweep up" a content-based subclass of proscribable expression provided that the impact on the proscribable subclass is incidental to the purpose of the statute. See R.A.V., 505 U.S. at 389-90.

n107 R.A.V., 505 U.S. at 389. In this example, the sexually derogatory fighting words represent a subclass of the larger proscribable category of fighting words, which is incidentally "swept up" by the Title VII anti-discrimination statute. See id.

n108 Id. at 390. It appears that many commentators and judges treat the "secondary effects" exception and this "sweeping up" exception as part of one larger exception. The "secondary effects" exception applies to statutes that target the harmful consequences that are derivative of proscribable expressive conduct, such as the higher crime rates that often flow from the presence of exotic dancing establishments. See supra note 105. In contrast, the "sweeping up" exception applies to statutes that are designed to regulate conduct and, which only incidentally, reach a subclass of proscribable expression. See R.A.V., 505 U.S. at 389. The confusion in this regard may be traced to the fact that the Court never examined the St. Paul ordinance in light of the "sweeping up" exception. See id. at 394. The Court's decision not to examine the ordinance ostensibly occurred because "St. Paul acknowledged that the ordinance was directed at expression." Id. at 392 (emphasis added). Apparently, Justice White recognized this confusion when he asserted that the "majority's conflation of the [two exceptions] . . . will haunt us and the lower courts." Id. at 409 n.11 (White, J., concurring in the judgment) (citing O'Brien, 391 U.S. at 37677).

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These three exceptions to the larger prohibition against content-based discrimination of a subclass of proscribable expression are rooted in content-neutral reasoning. n109 Still, "to validate such selectivity . . . it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." n110 This [*1132] represents a final, catch-all exception to the larger prohibition.

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n109 That is, these exceptions allow the government to make distinctions within the larger, unprotected class of expression because such distinctions do not reflect a sanctioned point of view. See R.A.V., 505 U.S. at 390.

n110 Id. ("We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.").

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The Court held that the St. Paul ordinance was facially unconstitutional even if, as interpreted by the Minnesota Supreme Court, it only reached the unprotected category of fighting words. n111 The Court stated that:

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n111 Id. at 391.

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The ordinance applies only to "fighting words" that insult or provoke violence, "on the basis of race, color, creed, religion or gender". . . . Those who wish to use "fighting words" in connection with other ideas--to express hostility . . . on the basis of political affiliation, union membership, or homosexuality--are not covered. n112

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n112 Id. For example, the St. Paul ordinance would reach the deliberate burning of a cross that "'arouses anger . . . on the basis of race,'" but would not reach an anti-gay appellation deliberately placed on the home of a homosexual couple, regardless of the degree to which such an act manifested hostility. Id. at 380 (quoting St. Paul, Minn., Leg. Code section 292.02 (1990)). "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on [officially] disfavored subjects." Id. at 391 (emphasis added).

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Thus, the St. Paul statute represented content-based discrimination within a larger class of proscribable expression.

Justice Scalia further stated that the St. Paul statute went "beyond mere content discrimination, to actual viewpoint discrimination." n113 He acknowledged that the statute proscribed the use of certain fighting words, such as "odious racial epithets," by individuals of all viewpoints. n114 He added, however, that "'fighting words' that do not . . . invoke race, color, creed, religion, or gender--aspersions upon a person's mother, for example--would seemingly be usable . . . in favor of racial, color, etc., tolerance and equality, but could not be used by these speakers' opponents." n115 To this end, Justice Scalia suggested that an individual "could hold up a sign saying . . . that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'" n116 Justice [*1133] Scalia also asserted that were the St. Paul statute directed at certain individuals, or classes of individuals, it "would be facially valid if it met the requirements of the Equal Protection Clause." n117

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n113 Id.

n114 R.A.V., 505 U.S. at 391.

n115 Id. See supra note 79 for the wording of the St. Paul statute.

n116 R.A.V., 505 U.S. at 391-92. Of course, Justice Scalia's "viewpoint discrimination" argument is vitiated by the fact that the word "papist" is not the only channel of expression open to that individual. See id. at 435 (Stevens, J., concurring in the judgment). Such an individual could conceivably rejoinder that "'all advocates of religious tolerance are misbegotten'" and seemingly not run afoul of the St. Paul ordinance. See id. (Stevens, J., concurring in the judgment).

n117 Id. at 392. Rather, he said that the statute was directed against "messages of . . . hatred and in . . . this case, messages 'based on virulent notions of racial supremacy.'" Id. (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 511 (Minn.), cert. granted sub nom. R.A.V. v. City of St. Paul, 501 U.S. 1204 (1991), and rev'd, 505 U.S. 377 (1992)).

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Justice Scalia rejected the idea that the St. Paul statute fell within any of the exceptions that enable a government to regulate a subclass of expression that falls within a larger class of unprotected expression. n118 According to Justice Scalia, the St. Paul statute did not fall within the first exception "for content discrimination based on the very reasons why the particular class of speech at issue . . . is proscribable." n119 Justice Scalia noted that fighting words are exempted from First Amendment protection because "their content embodies a particularly intolerable . . . mode of expressing whatever idea the speaker wishes to convey." n120 To this end, Justice Scalia asserted that St. Paul did not proscribe a specific subclass of fighting words on the basis that it represented a particularly intolerable or "offensive mode of expression." n121 "Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance." n122

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n118 Id. at 393; see also supra notes 96-110 and accompanying text.

n119 R.A.V., 505 U.S. at 393; see also supra notes 99-103 and accompanying text.

n120 R.A.V., 505 U.S. at 393.

n121 Id. ("St. Paul has not . . . for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner.").

n122 Id. at 393-94 (emphasis added).

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Justice Scalia rejected St. Paul's claim that its statute came under the second exception "that allows content discrimination aimed only at the 'secondary effects' of the speech." n123 St. Paul had claimed that its statute was designed to protect the emotional sensibilities of members of groups that historically have been the objects of discrimination. n124 As Justice Scalia pointed out, however, "'the emotive impact of speech on [*1134] its audience is not a "secondary effect."'" n125

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n123 Id. at 394 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)); see also supra notes 104-05, 108 and accompanying text.

n124 R.A.V., 505 U.S. at 394 ("According to St. Paul, the ordinance is intended . . . to 'protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.'" (quoting Brief for Respondent at 28, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (No. 90-7675))).

n125 Id. (quoting Boos v. Barry, 485 U.S. 312, 321 (1988) (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986))).

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Finally, Justice Scalia categorically dismissed any notion that the St. Paul statute satisfied the final, catch-all exception. n126 "It hardly needs discussion that the ordinance does not fall within some more general exception permitting all selectivity that . . . is beyond the suspicion of official suppression of ideas." n127

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n126 Id. at 395.

n127 Id.; see supra notes 109-10 and accompanying text. Again, the Court did not appear to address whether the statute fell within the exception that allows a subclass of unprotected expression to be incidentally "swept up" by a statute that targets conduct. See supra notes 106-08 and accompanying text.

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Justice Scalia also stated that the St. Paul statute did not survive strict scrutiny analysis in which a content-based regulation "is nonetheless justified because it is narrowly tailored to serve compelling state interests." n128 St. Paul had claimed that its statute served the compelling state interest of "ensuring the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." n129 Justice Scalia conceded that the statute's purpose was a compelling state interest and that the ordinance was, in fact, designed to serve that interest. n130 He added, however, that "the dispositive question in this case . . . is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not." n131

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n128 R.A.V., 505 U.S. at 395; see also supra note 23.

n129 R.A.V., 505 U.S. at 395.

n130 Id.

n131 Id. at 395-96. "The existence of adequate content-neutral alternatives thus 'undercuts significantly' any defense of such a statute." Id. at 395 (alteration in original) (quoting Boos v. Barry 485 U.S. 312, 329 (1988)).

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C. The Concurring Dissent

1. Justice White's Opinion

Justice White authored a concurring opinion that read more like a dissent. n132 He agreed with the Court's judgment that the St. Paul statute was unconstitutional and that the decision of the Minnesota Supreme Court should be reversed. n133 Justice White argued, however, that the [*1135] St. Paul statute was unconstitutional because it was "fatally overbroad . . . as it criminalized not only unprotected expression but expression protected by the First Amendment [as well]." n134 Justice White asserted that the Minnesota Supreme Court was wrong in construing the St. Paul statute to reach only fighting words as defined in Chaplinsky. n135 Justice White interpreted the Minnesota court's application of the Chaplinsky language to the wording of the St. Paul statute to mean that "St. Paul may constitutionally prohibit expression that 'by its very utterance' n136 causes 'anger, alarm or resentment.'" n137 In this regard, Justice White asserted that "the mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." n138 As such, he concluded that the St. Paul statute was overbroad because "expressive conduct that causes only hurt feelings, offense, or resentment" is made criminal. n139

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n132 See id. at 397-415 (White, J., concurring in the judgment). Justice White was joined by Justices Blackmun, O'Connor, and, for the most part, Justice Stevens. See id. at 397 (White, J., concurring in the judgment).

n133 Id. at 397 (White, J., concurring in the judgment).

n134 R.A.V., 505 U.S. at 397 (White, J., concurring in the judgment).

n135 Id. at 413 (White, J., concurring in the judgment) ("In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in Chaplinsky--words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

n136 Id. at 414 (White, J., concurring in the judgment) (quoting Chaplinsky, 315 U.S. at 572).

n137 Id. (White, J., concurring in the judgment) (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn.), cert. granted sub nom. R.A.V. v. City of St. Paul, 501 U.S. 1204 (1991), and rev'd, 505 U.S. 377 (1992); see also supra notes 79, 81 and accompanying text; supra part II.B.2.

n138 R.A.V., 505 U.S. at 414 (White, J., concurring in the judgment) (citing United States v. Eichman, 496 U.S. 310, 314 (1990); Texas v. Johnson, 491 U.S. 397, 409, 414 (1989); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978); Hess v. Indiana, 414 U.S. 105, 107-08 (1973); Cohen v. California, 403 U.S. 15, 20 (1971); Street v. New York, 394 U.S. 576, 592 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949)).

n139 Id. (White, J., concurring in the judgment). Justice White's view that the St. Paul statute was fatally overbroad contrasts with his characterization that the majority struck down the statute because it was fatally underinclusive. Id. at 401-02 (White, J., concurring in the judgment). "Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words." Id. at 401 (White, J., concurring in the judgment). In response, Justice Scalia said that "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation." Id. at 387. A state may prohibit "obscenity . . . only in certain media or markets, for although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content." Id.

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While Justice White agreed with the Court's judgment, he sharply [*1136] rebuked the majority's rationale. n140 He rejected Justice Scalia's analogy that fighting words were like a noisy sound truck in which both serve as a mode of expression. n141 "Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury." n142 Justice White added that fighting words, like all proscribable classes of expression, were intrinsically "worthless or of de minimis value to society," n143 and that any expressive interests inherent in such words were overwhelmingly outweighed by the evil that the legislation would aim to restrict. n144 He stated that it did not make sense to permit a state to proscribe an entire class of speech on the grounds that the speech was evil, but not allow a state to proscribe a subset of that class of speech on the same grounds. n145 "A ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate-speech, without creating the danger of driving viewpoints from the marketplace." n146

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n140 See id. at 397-415 (White, J., concurring in the judgment).

n141 See generally id. at 400-01, 408 (White, J., concurring in the judgment); see also supra notes 90-92 and accompanying text.

n142 R.A.V., 505 U.S. at 401 (White, J., concurring in the judgment) (emphasis added) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

n143 Id. at 400 (White, J., concurring in the judgment) (citing Chaplinsky, 315 U.S. at 571-72).

n144 Id. (White, J., concurring in the judgment).

n145 Id. at 401 (White, J., concurring in the judgment) ("The content of the subset is by definition worthless and undeserving of constitutional protection.").

n146 Id. (White, J., concurring in the judgment) (citing id. at 387).

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Justice White further asserted that even if the St. Paul statute were a content-based regulation that was not overbroad, it nonetheless would survive strict scrutiny. n147 He agreed with the majority that the statute served a compelling state interest but disagreed with the majority's reasoning that the key inquiry was whether content discrimination was reasonably necessary to serve that interest. n148 "Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech." n149 Justice White maintained that the proscription of more speech rather than less speech was anti [*1137] thetical to principles of strict scrutiny analysis. n150

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n147 R.A.V., 505 U.S. at 403-04 (White, J., concurring in the judgment). See supra note 23 for a discussion of strict scrutiny analysis.

n148 R.A.V., 505 U.S. at 403-04 (White, J., concurring in the judgment); see also supra note 23 and accompanying text.

n149 R.A.V., 505 U.S. at 404 (White, J., concurring in the judgment).

n150 Id. (White, J., concurring in the judgment). See supra note 23 for a discussion of strict scrutiny analysis. Justice White added that even though the St. Paul ordinance would satisfy strict scrutiny, it was rightly subject only to rational review because "the First Amendment does not apply to categories of unprotected speech." R.A.V., 505 U.S. at 406 (White, J., concurring in the judgment). He claimed the statute easily satisfied rational review, which merely requires that the "regulation of unprotected speech be rationally related to a legitimate government interest." Id. (White, J., concurring in the judgment). Notwithstanding his criticism of the majority's strict scrutiny analysis and his blatant assertion that the St. Paul statute satisfied strict scrutiny, id. at

403-06 (White, J., concurring in the judgment), Justice White did not directly address the strict scrutiny requirement that the legislative body have no less discriminatory alternatives available to the statute under review. See id. (White, J., concurring in the judgment); see also supra note 23 and accompanying text.

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Justice White also sharply rebuked the majority's "apparently nonexhaustive list of ad hoc exceptions . . . created to anticipate some of the questions that will arise from its radical revision of First Amendment law." n151 He said that the first exception--where content-based discrimination is permitted if it is predicated on "'the very reason the entire class of speech at issue is proscribable'"--should apply to the St. Paul statute. n152 To this end, he alluded to the majority's application of this exception to the content-based federal statute that proscribes specific threats against the President and not against government officials generally. n153 "'The reasons why threats of violence are outside the First Amendment [is because they] . . . have special force when applied to the person of the President.'" n154 By analogy, Justice White said that this exception "should apply to the St. Paul ordinance, since 'the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination].'" n155 He further stated that the majority had erred in saying that the first exception did not apply to the St. Paul statute on the grounds that it did not target a "particularly objectionable mode of communication." n156 Fighting words are "a message that is at [*1138] its ugliest [and, thus, most objectionable] when directed against groups that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory." n157

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n151 R.A.V., 505 U.S. at 407 (White, J., concurring in the judgment).

n152 Id. at 408 (White, J., concurring in the judgment) (quoting id. at 388). See supra notes 99-103 and accompanying text for a discussion of the majority's first exception.

n153 R.A.V., 505 U.S. at 408 (White, J., concurring in the judgment); see also supra notes 102-03 and accompanying text.

n154 R.A.V., 505 U.S. at 408 (White, J., concurring in the judgment) (quoting id. at 388).

n155 Id. (White, J., concurring in the judgment) (alterations in original) (omission in original) (quoting id. at 388).

n156 Id. (White, J., concurring in the judgment) (citing id. at 386, 393). He rejected the majority's assertion that fighting words were merely a mode of expression whose total proscription merely reflected content-neutral regulation. Id. (White, J., concurring in the judgment) ("A prohibition on fighting words is not a time, place, or manner restriction . . . ." (citation omitted)).

n157 Id. at 408-09 (White, J., concurring in the judgment).

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Justice White also stated that the majority fashioned its "secondary effects" exception in order to insulate Title VII sexual harassment claims from falling into the Court's larger proscription on content-based discrimination within a larger class of proscribable expression. n158 "The regulation does not prohibit workplace harassment generally; it focuses on what the majority would characterize as the 'disfavored topic' of sexual harassment." n159 "In this way, Title VII is similar to the St. Paul ordinance . . . . [Therefore, u]nder the broad principle the Court uses to decide the present case, . . . [Title VII] claims based on sexual harassment should fail First Amendment review . . . ." n160

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n158 Id. at 409 (White, J., concurring in the judgment). See supra notes 104-05, 108 and accompanying text for a brief discussion of the majority's second exception.

n159 R.A.V., 505 U.S. at 409 (White, J., concurring in the judgment) (alteration in original) (quoting id. at 391).

n160 Id. at 409-10 (White, J., concurring in the judgment) (citation omitted). Justice White's analysis underscored the confusion that could encompass the "secondary effects" and "sweeping up" exceptions. Specifically, Justice Scalia did not directly assert that Title VII regulates the secondary effects, such as an absence of parity of economic opportunity, that have been associated with sexual harassment in the workplace. See id. at 389-90. Rather, he seemed to suggest that Title VII was an example of the type of regulation that targeted the objective act of harassment and only incidentally "swept up" a subclass of proscribable expression known as "sexually derogatory 'fighting words.'" Id. at 389. In any event, Justice White suggested that Title VII would not satisfy either exception. First, he said that Title VII would not satisfy the "secondary effects" exception because it is not "keyed to the presence or absence of an economic quid pro quo." Id. at 410 (White, J., concurring in the judgment) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)). He added that Title VII would not satisfy the "sweeping up" exception because the regulation "reaches beyond any 'incidental' effect on speech." Id. (White, J., concurring in the judgment) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)). Justice White referred to the majority's treatment of these two exceptions as a "conflation . . . that . . . will haunt us and the lower courts." Id. at 409 n.11 (White, J., concurring in the judgment); see also supra notes 104-08 and accompanying text.

It would appear that a number of courts have inferred that Justice Scalia definitively linked the "secondary effects" exception to Title VII. See, e.g., The Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 520 (D.N.J. 1995) ("Justice Scalia cited Title VII as an example of a content-neutral regulation of the 'secondary effects' of speech . . . ." (citing R.A.V., 505 U.S. at 388-91 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)))); State v. Talley, 858 P.2d 217, 226 (Wash. 1993) ("Title VII . . . is concerned with the additional harm to the victim of a hate crime and that crime's effect on society as a whole." (emphasis added)). For criticism and discussion of a linkage between Title VII and the "secondary effects" exception, see generally Suzanne Sangree, Title VII Prohibitions

Against Hostile Environment Sexual Harassment: No Collision in Sight, 47 Rutgers L. Rev. 461 (1995); Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791 (1992).

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Finally, Justice White ridiculed the majority's general, catch-all exception as a means "to protect against unforeseen problems." n161 "This case does not concern the official suppression of ideas." n162

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n161 R.A.V., 505 U.S. at 410 (White, J., concurring in the judgment). See supra notes 109-10 and accompanying text for a discussion of the general, catch-all exception.

n162 R.A.V., 505 U.S. at 411 (White, J., concurring in the judgment) (citing id. at 401).

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2. Justice Stevens's Opinion

Justice Stevens wrote an opinion in which he agreed with Justice White that the St. Paul statute was fatally overbroad. n163 He criticized, however, both Justice White and the majority for their absolutist positions. n164 He sharply rebuked the majority's position that within an unprotected class of expression, "a government must either proscribe all speech or no speech at all." n165 Justice Stevens also asserted that the [*1140] majority's prohibition of content-based discrimination of unprotected expression gave such expression the "same sort of protection afforded core political speech." n166

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n163 See id. at 416 (Stevens, J., concurring in the judgment). Justices White and Blackmun joined Justice Stevens in part. Justice Blackmun also wrote a very short opinion in which he expressed his concern about the majority's decision. Id. at 41516 (Blackmun, J., concurring in the judgment). He was particularly concerned that the Court's ruling would afford traditionally unprotected expression the same level of protection that the Court affords political expression. Id. at 415 (Blackmun, J., concurring in the judgment) ("If all expressive activity must be afforded the same protection, that protection will be scant. . . . If we are forbidden from categorizing . . . we shall reduce protection across the board.").

n164 Id. at 417 (Stevens, J., concurring in the judgment).

n165 Id. at 419 (Stevens, J., concurring in the judgment) (footnote omitted). Justice Stevens cited a number of previous instances in which the Court had permitted content-based regulations of expression. Id. at 421-22 (Stevens, J., concurring in the judgment) (footnote omitted) (discussing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992); FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447

(1978); Broadrick v. Oklahoma, 413 U.S. 601 (1973); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946)). "All of these cases involved the selective regulation of speech based on content--precisely the sort of regulation the Court invalidates today." Id. at 422 (Stevens, J., concurring in the judgment).

n166 Id. at 422 (Stevens, J., concurring in the judgment). Justice Stevens said that past Court decisions created a three-tiered "hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial . . . and non-obscene, sexually explicit speech are . . . second-class expression; obscenity and fighting words receive the least protection of all." Id. (Stevens, J., concurring in the judgment). He thought it noteworthy that the Court qualified freedom of commercial speech on a contextual basis but was unwilling to accommodate selective restrictions on lesser protected speech. Id. at 422-23 (Stevens, J., concurring in the judgment) (citing Burson v. Freeman, 504 U.S. 191, 195, 196 (1992)). "The Court today turns First Amendment law on its head: Communication that was once entirely unprotected . . . is now entitled to greater protection than commercial speech . . . ." Id. at 423 (Stevens, J., concurring in the judgment) (citing Burson, 504 U.S. at 195, 196). See infra part IV.D.4 for a discussion of commercial speech within the post-R.A.V. context.

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Like Justice White, Justice Stevens disparaged the majority's use of exceptions to its larger holding, and suggested that they were necessary "because the Court recognized the[] perversities [of its decision]." n167 Justice Stevens further wrote: "Although the Court recognizes exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional." n168

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n167 R.A.V., 505 U.S. at 423 (Stevens, J., concurring in the judgment). Justice Stevens's criticism of the Court's exceptions were primarily limited to the first exception. Id. at 423-25 (Stevens, J., concurring in the judgment). See supra notes 99-103 and accompanying text for a discussion of the first exception.

n168 R.A.V., 505 U.S. at 425-26 (Stevens, J., concurring in the judgment).

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While Justice Stevens strongly disagreed with the majority's rationale, he also disagreed with parts of Justice White's analysis. n169 Specifically, he took exception to Justice White's endorsement of a categorical dichotomy between protected and unprotected expression. n170 He noted that "the categorical approach does not take seriously the importance of context." n171 In this regard, Justice Stevens advanced the idea that expression in the abstract is not amenable to a categorical legislative judgment. n172 Justice Stevens remarked that the Court had moved [*1141] in a less-categorical direction as "the Court has recognized intermediate categories of speech." n173

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n169 Id. at 426-28 (Stevens, J., concurring in the judgment).

n170 Id. at 426 (Stevens, J., concurring in the judgment) ("Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries.").

n171 Id. (Stevens, J., concurring in the judgment).

n172 Id. at 427 (Stevens, J., concurring in the judgment) ("The 'question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.'" (quoting New York v. Ferber, 458 U.S. 747, 778 (1982) (Stevens, J., concurring in the judgment) (citing Smith v. United States 431 U.S. 291, 311-21 (1977) (Stevens, J., dissenting)))).

n173 R.A.V., 505 U.S. at 427 (Stevens, J., concurring in the judgment). In this regard, Justice Stevens cited a number of recent cases in which the Court modified its previous "all-or-nothing" approach to categories of unprotected expression. Id. at 427-28 (Stevens, J., concurring in the judgment) (discussing Houston v. Hill, 482 U.S. 451 (1987); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Lewis v. New Orleans, 415 U.S. 130 (1974); Cohen v. California, 403 U.S. 15 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952); Valentine v. Chrestensen, 316 U.S. 52 (1942)). Such cases include commercial speech, indecent, non-obscene speech, and libelous speech. Id.; see also supra note 33 and accompanying text; part II.B.2.

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In rejecting the categorical approach, Justice Stevens proposed that courts examine an array of factors in assessing the constitutionality of a content-based ordinance that regulates expression. n174 Specifically, he proposed that courts examine the expression's content, the context within which the expression is offered, and the nature and scope of the restriction. n175 In applying his multiple-factored test to the St. Paul statute, Justice Stevens concluded that it would have been constitutional were it not overbroad. n176

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n174 R.A.V., 505 U.S. at 428-32 (Stevens, J., concurring in the judgment).

n175 Id. at 429-31 (Stevens, J., concurring in the judgment). "Such a multi-faceted analysis cannot be conflated into two dimensions." Id. at 431 (Stevens, J., concurring in the judgment).

n176 Id. at 432-36 (Stevens, J., concurring in the judgment). First, Justice Stevens argued that the ordinance did not target a particular subject matter, but rather the harm caused by the subject matter. Id. at 433 (Stevens, J., concurring in the judgment). In this regard, he referred to Ferber, a case in which the Court said that a state may target an especially harmful subclass of obscenity. Id. at 434 (Stevens, J., concurring in the judgment); see also supra notes 99-103 and accompanying text. Justice Stevens also asserted that even if the ordinance represented a subject matter regulation, it did not amount to

viewpoint discrimination. R.A.V., 505 U.S. at 434-35 (Stevens, J., concurring in the judgment). "The St. Paul ordinance is evenhanded. . . . It does not . . . favor one side of any debate." Id. at 435 (Stevens, J., concurring in the judgment) (footnote omitted). Justice Stevens added that subject matter regulations "do not raise the same concerns of government censorship . . . presented by viewpoint regulations." Id. at 434 (Stevens, J., concurring in the judgment). As such, the St. Paul "subject matter . . . regulation would . . . be constitutional." Id. (Stevens, J., concurring in the judgment). He also said that because the St. Paul statute regulated conduct, and not verbal expression, "'the government generally has a freer hand'" in regulating such conduct. Id. at 429 (Stevens, J., concurring in the judgment) (alteration in original) (quoting Texas v. Johnson, 491 U.S. 397, 406 (1989) (citing United States v. O'Brien, 391 U.S. 367 (1968))). Finally, Justice Stevens asserted that the statute was sufficiently narrow in construction, which "leaves open and protected a vast range of expression." R.A.V., 505 U.S. at 436 (Stevens, J., concurring in the judgment).

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IV. Analysis: The R.A.V. Legacy

A. Introduction

In its most limited interpretation, the R.A.V. holding simply served to strike down a city ordinance on the grounds that a legislative body may not proscribe a subclass of fighting words, subject to specific exceptions. n177 The concurring minority opinions, though in agreement with the majority's judgment, took strong exception to the Court's rationale. n178 More broadly, the concurring minority opinions and other commentators suggested that the R.A.V. holding would have a wide-ranging and inconsistent impact on subsequent First Amendment jurisprudence. n179 The thrust of this predictive commentary reduces itself to a series of rhetorical concerns. First, to what extent would the R.A.V. ruling affect other kinds of hate-speech ordinances, in particular, and regulations of proscribable expression generally? n180 Second, to what extent [*1143] would the majority's list of exceptions vitiate the impact of R.A.V.? n181 Third, would the R.A.V. holding lead to a movement toward broader restrictions on expression? n182 Fourth, in what other contexts would the R.A.V. holding apply? n183

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n177 See supra part III.B.

n178 See supra part III.C.

n179 See R.A.V., 505 U.S. at 411 (White, J., concurring in the judgment) ("As I see it, the Court's theory does not work and will do nothing more than confuse the law."). More generally, see id. at 397-415 (White, J., concurring in the judgment); id. at 415-16 (Blackmun, J., concurring in the judgment); id. at 416-36 (Stevens, J., concurring in the judgment); see also supra part III.C. For articles that discussed possible implications of R.A.V., see generally Lawrence Friedman, Regulating Hate Speech at Public Universities After R.A.V. v. City of St. Paul, 37 How. L.J. 1 (1993); Elena Kagan, Regulation of Hate Speech and

Pornography After R.A.V., 60 U. Chi. L. Rev. 873 (1993); Thomas H. Moore, R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech, 71 N.C. L. Rev. 1252 (1993); Andrea L. Crowley, Note, R.A.V. v. City of St. Paul: How the Supreme Court Missed the Writing on the Wall, 34 B.C. L. Rev. 771 (1993); J. Steven Justice, Comment, Ethnic Intimidation Statutes Post-R.A.V.: Will They Withstand Constitutional Scrutiny?, 62 U. Cin. L. Rev. 113 (1993).

n180 See generally Craig P. Gaumer, Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes, 39 S.D. L. Rev. 1 (1994); Jonathan D. Selbin, Note, Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After R.A.V., 72 Or. L. Rev. 157 (1993); Note, The Demise of the Chaplinsky Fighting Words Doctrine, supra note 51. With respect to campus speech codes, see generally Thomas A. Schweitzer, Hate Speech on Campus and the First Amendment: Can They be Reconciled?, 27 Conn. L. Rev. 493 (1995); Robert A. Sedler, The Unconstitutionality of Campus Bans on "Racist Speech": The View from Without and Within, 53 U. Pitt. L. Rev. 631, 683 (1992) (The R.A.V. decision will sound the "death knell for campus bans on racist speech"); see also Michelle M. Huhnke, Standing and the First Amendment: A Preenforcement Challenge to Child Pornography Forfeiture Laws, 61 Geo. Wash. L. Rev. 1689 (1993); Kagan, supra note 179; Ian L. Saffer, Obscenity Law and the Equal Protection Clause: May States Exempt Schools, Libraries, and Museums from Obscenity Statutes?, 70 N.Y.U. L. Rev. 397 (1995); Rodney A. Smolla, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 Tex. L. Rev. 777 (1993); Note, Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective, 106 Harv. L. Rev. 1075 (1993).

n181 See R.A.V., 505 U.S. at 407-11 (White, J., concurring in the judgment).

n182 See generally Moore, supra note 179; see also R.A.V., 505 U.S. at 397-415 (White, J., concurring in the judgment).

n183 See generally Alan I. Bigel, Planned Parenthood of Southeastern Pennsylvania v. Casey: Constitutional Principles and Political Turbulence, 18 U. Dayton L. Rev. 733 (1993); Angela M. Hubbell, 'FACE'ing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protestors, 21 Ohio N.U. L. Rev. 1061 (1995); Carolyn J. Lockwood, Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?, 21 Ohio N.U. L. Rev. 995 (1995).

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Since 1992, the R.A.V. holding has influenced an array of federal and state cases. R.A.V.'s greatest impact has occurred on cases that involve hate-crime legislation. The majority of states and many communities have passed what is termed "hate-crime legislation." n184 Some of these statutes, like the St. Paul ordinance in R.A.V., are directed at expression. n185 Other hate-crime statutes enhance the penalty for crimes [*1144] that were committed because of the victim's status. n186 It is this latter class of statutes that the Supreme Court said is designed to regulate conduct. n187 The subsequent analysis will examine the impact of R.A.V. on these two classes of hate-crime legislation. n188

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n184 See State v. Talley, 858 P.2d 217, 219 (Wash. 1993); Hate Crimes Laws, supra note 73, at 1-2, 7-10, 29-38; see also generally Anti-Defamation League, Hate Crimes Statutes: A 1991 Status Report (1991).

n185 See Talley, 858 P.2d at 219; see also infra part IV.B. One commentator has suggested that such expression, known as hate-speech, can be identified by three characteristics: (1) a "message . . . of . . . inferiority"; (2) a message "directed against . . . historically oppressed groups"; and (3) a message that "is persecutorial, hateful, and degrading." Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2357 (1989). Professor Matsuda proposed this paradigm specifically within the context of racially motivated hate speech. Id. Prior to a judicial determination that this type of hate-crime statute offends the First Amendment, a court must find that the legislation in question actually regulates expression. While the "[R.A.V.] Court did not explicitly state that . . . acts prohibited by the [St. Paul ordinance] are expression cognizable by the First Amendment, such a conclusion necessarily precedes the Court's holding that the ordinance facially violated the First Amendment." State v. Sheldon, 629 A.2d 753, 757 (Md. 1993). In R.A.V., the Court accepted the Minnesota Supreme Court's construction that the St. Paul ordinance only reached that form of expression known as fighting words. R.A.V., 505 U.S. at 380; see also supra notes 81, 85 and accompanying text.

n186 This type of hate-crime statute is commonly known as penalty enhancement legislation. See Talley, 858 P.2d at 219; see generally Hate Crimes Laws, supra note 73; see also infra part IV.C. In 1993, the United States Supreme Court upheld the constitutionality of penalty enhancement legislation in Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993). For a discussion of Mitchell, see infra part IV.C. On penalty enhancement legislation generally, see Mitchell, 508 U.S. at 483 n.4; Susan Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 UCLA L. Rev. 333, 333-34 (1991); Tanya K. Hernandez, Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence," 99 Yale L.J. 845, 848-55 (1990); Note, Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes, 106 Harv. L. Rev. 1314 (1993).

n187 Mitchell, 508 U.S. at 487 ("The statute in this case is aimed at conduct unprotected by the First Amendment.").

n188 For a discussion of the ways in which R.A.V. has had an impact on cases in areas outside of hate-crime legislation, see infra part IV.D.

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B. R.A.V. and Hate-Crime Statutes Regulating Expression

1. Principal Case Law

In light of R.A.V., a number of courts have examined the constitutionality of hate-crime statutes regulating expression. n189 In State v. Vawter, n190 the New Jersey Supreme Court relied on R.A.V. to strike down two sections of that state's hate-crime statute. n191 The Vawter [*1145] court said that even if it limited the construction of the two contentbased n192 sections to fighting words, the sections would "not fit within any of the [R.A.V.] exceptions to the prohibition against content discrimination." n193 The Vawter court also said

that, like the St. Paul ordinance, the two New Jersey provisions would not survive strict scrutiny analysis. n194 The court "concluded that Sections 10 and 11 were underinclusive and thus impermissible under R.A.V. . . . Inasmuch as the language of Sections 10 and 11 limited their scope to the disfavored topics of race, color, creed, and religion, the statutes of [*1146] fended the First Amendment." n195

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n189 See, e.g., In re Steven S., 31 Cal. Rptr. 2d 644 (Ct. App. 1994); In re M.S. 22 Cal. Rptr. 2d 560 (Ct. App. 1993), aff'd, 896 P.2d 1365 (Cal. 1995); State v. T.B.D., 638 So. 2d 165 (Fla. Dist. Ct. App. 1994), rev'd, 656 So. 2d 479 (Fla. 1995), cert. denied, 116 S. Ct. 1014 (1996); State v. Sheldon, 629 A.2d 753 (Md. 1993); State v. Vawter, 642 A.2d 349 (N.J. 1994); State v. Ramsey, 430 S.E.2d 511 (S.C. 1993); State v. Talley, 858 P.2d 217 (Wash. 1993). Much of the analysis focuses on Vawter, Sheldon, T.B.D., Ramsey, and Talley. For a discussion of the California cases, see infra part IV.B.3.

n190 State v. Vawter, 642 A.2d 349 (N.J. 1994).

n191 Id. at 353. The defendants were accused of spray painting a swastika and the phrase "Hitler Rules" on a New Jersey synagogue. Id. at 352. They were charged under sections 10 and 11 of New Jersey's hate-crime statute. Id. (citing N.J. Stat. Ann. sections 2C:33-10 to -11 (West 1991)). Section 10 provided in relevant part:

A person is guilty of a crime of the third degree if he . . . puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika.

Id. (alteration in original) (quoting N.J. Stat. Ann. section 2C:33-10 (West 1991)).

Section 11 provided in relevant part:

A person is guilty of a crime . . . if he purposely defaces or damages, without authorization . . . any private premises . . . used for religious, educational, . . . purposes, or for assembly by persons of a particular race, color, creed or religion by placing thereon a symbol . . . that exposes another to threat of violence, contempt or hatred on the basis of race, color, creed or religion . . . .

Id. (quoting N.J. Stat. Ann. section 2C:33-11 (West 1991)).

The trial court denied the defendants' motion to dismiss and found the sections distinguishable from the St. Paul ordinance at issue in R.A.V. Id. at 353. The basis of the direct appeal to the New Jersey Supreme Court was the constitutional challenge to these sections. See id. at 352. A comparison reveals that sections 10 and 11 used substantially the same language as the St. Paul ordinance. See supra note 79.

n192 Vawter, 642 A.2d at 358. In looking at legislative intent and relevant case law, the court concluded that both sections 10 and 11 were content-based regulations of expressive conduct. Id. at 353.

n193 Id. at 358; see also supra notes 96-110 and accompanying text. The Vawter court likewise said that none of the R.A.V. exceptions would apply if it limited the construction of the sections to a proscribable class of expression known as threats. Vawter, 642 A.2d at 358-59. The United States Supreme Court made threats a proscribable class of expression in Watts v. United States, 394 U.S. 705, 706-07 (1969). See supra note 30 and accompanying text. The Vawter court added that the statute suffered from vagueness and overbreadth. Vawter, 642 A.2d at 359.

n194 Vawter, 642 A.2d at 359-60. According to the court:

> Sections 10 and 11 serve the same compelling state interest that the St. Paul ordinance served: protecting the human rights of members of groups that historically have been the objects of discrimination. But our hate-crime statutes, like the St. Paul ordinance, are not narrowly tailored. R.A.V. dictates that where other content-neutral alternatives exist, a statute directed at disfavored topics is impermissible.

Id. at 360.

n195 Id. at 360.

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In State v. Sheldon, n196 Maryland's highest court examined the constitutionality of a state statute that proscribed the burning of a "'cross or other religious symbol upon any private or public property'" without prior consent of the owner and notification to the fire department. n197 Like the courts in R.A.V. and Vawter, the Sheldon court ruled that Maryland's statute regulated expression in a content-based manner. n198 The Sheldon court did not, unlike the Minnesota Supreme Court, n199 limit the construction of the Maryland statute as only reaching a class of proscribable expression. n200 The Sheldon court stated that even if it were to so limit the statute, the statute would not be saved by the R.A.V. exceptions that provide for content-based discrimination within a proscribable class of expression. n201 The court also found that the statute did not survive strict scrutiny analysis. n202 The Sheldon court ruled [*1147] that the statute was unconstitutional, affirming the decision of the trial court. n203

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n196 State v. Sheldon, 629 A.2d 753 (Md. 1993).

n197 Id. at 756 (quoting Md. Ann. Code art. 27, section 10A (1992)). The trial court in Prince Georges County had ruled the statute unconstitutional. Id. Maryland's highest court granted direct appellate review. Id. In relevant part the statute read as follows:

It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place.

Id. at 755-56 (quoting Md. Ann. Code art. 27, section 10A (1992)).

n198 See id. at 756-60. "The burning of a cross or other religious symbols is speech in the contemplation of the First Amendment." Id. at 757. "We believe the . . . statute is a content-based regulation of speech . . . ." Id. at 759. In ruling that the statute was content-based, the Sheldon court looked to legislative intent. Id. at 759-60.

n199 See supra note 81 and accompanying text.

n200 Sheldon, 629 A.2d at 762 ("Here, the State has not made the case, as Minnesota did, that the burning of religious symbols constitutes proscribable fighting words.").

n201 Id. at 761-62. For a discussion of the R.A.V. exceptions, see supra notes 96110 and accompanying text. The court particularly rejected the State's argument that the statute was saved by R.A.V.'s "secondary effects" exception. Sheldon, 629 A.2d at 761-62; see also supra notes 104-05, 108 and accompanying text. The State argued that "the secondary effects of burning religious symbols were fire hazards posed to property owners and the community." Sheldon, 629 A.2d at 761. The court responded that given Maryland's pre-existing laws on fire hazards, the statute did little to add to this "legal scheme." Id. The court also doubted that the burning of religious symbols presented major fire hazards. Id. at 762.

n202 Sheldon, 629 A.2d at 762-63. Unlike the Vawter court, however, the Sheldon court, when performing the strict scrutiny analysis, did not liken the statute to the St. Paul ordinance. Id.; see also supra notes 23, 194 and accompanying text.

n203 Sheldon, 629 A.2d at 763.

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The Sheldon court struck down a statute on the grounds that it impermissibly discriminated on the basis of content. n204 A Florida appeals court in State

v. T.B.D. n205 struck down a similar statute on overbreadth grounds, only to be reversed by the Florida Supreme Court. n206 While the statute in Sheldon referred to the burning of a cross "or other religious symbol," n207 the T.B.D. statute only referred to a "burning or flaming cross, real or simulated." n208

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n204 Id.

n205 State v. T.B.D., 638 So. 2d 165, 169 (Fla. Dist. Ct. App. 1994) [hereinafter T.B.D. I], rev'd, 656 So. 2d 479 (Fla. 1995), cert. denied, 116 S. Ct. 1014 (1996). For a discussion of the overbreadth doctrine, see supra note 59.

n206 State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995) [hereinafter T.B.D. II], cert. denied, 116 S. Ct. 1014 (1996).

n207 Sheldon, 629 A.2d at 755-56.

n208 T.B.D. I, 638 So. 2d at 166. The statute in Sheldon referred to a burning on any "private or public property," Sheldon, 629 A.2d at 756, while the statute in T.B.D. proscribed burnings "on the property of another." T.B.D. I, 638 So. 2d at 166. All other differences in wording had no bearing on the issue at hand. In relevant part, the T.B.D. statute read as follows:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner . . . .

Id. at 166-67 (quoting Fla. Stat. ch. 876.18 (1993)).

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The T.B.D. I court chose not to apply the R.A.V. analysis since the statute "is [overbroad and] not, by its terms, limited to types of expressive conduct traditionally recognized as being entitled to little or no protection under the First Amendment." n209 The Florida court added that even if it could limit the construction of the statute as only reaching unprotected expression, such as fighting words or advocacy of imminent illegal conduct, it would still be unconstitutional under R.A.V. since it would only proscribe "one type of . . . conduct, [cross burning], based upon the content of the message." n210 Unlike the Sheldon court, [*1148] the T.B.D. I court did not even consider whether, under such a construction, any of the R.A.V. exceptions would save the purportedly content-based statute. n211

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n209 Id. at 168. "The [Duval County] trial court agreed that the statute was facially unconstitutional, although relying principally upon R.A.V. . . . ." Id. at 167.

n210 Id. at 169.

n211 Id. For a discussion of the R.A.V. exceptions, see supra notes 96-110.

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In 1995, the Florida Supreme Court saved the statute. n212 In direct contrast to the lower T.B.D. I ruling, the Florida high court said that the statue was not overbroad. n213 In so ruling, the Florida Supreme Court limited the statute as only reaching the proscribable classes of expression of threats and fighting words. n214 The court then ruled that the statute comported with R.A.V. because, unlike the St. Paul ordinance, the Florida statute did not proscribe expression on the basis of certain topics such as race, religion, or gender. n215 Rather, the Florida court said that the statute "cut[] across the board evenly" and was "an even-handed and neutral ban on a manifestly damaging form of expressive activity." n216

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n212 T.B.D. II, 656 So. 2d at 482.

n213 Id. ("The statute's plain language--the unauthorized placing of a flaming cross on the property of another--is eminently proscribable under the First Amendment . . . . The threat of overbreadth is speculative at best . . . .").

n214 Id. at 481.

n215 Id. ("No mention is made of any special topic such as race, color, creed, religion or gender.").

n216 Id.

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In State v. Ramsey, n217 the South Carolina Supreme Court struck down a statute whose only material difference in wording from the T.B.D. statute was that the Florida statute only referred to a cross burning "'on the property of another,'" n218 whereas the South Carolina statute also referred to cross burning "'in a public place.'" n219 In stark contrast with the Florida Supreme Court's T.B.D. II ruling, the Ramsey court held that the South Carolina statute was an impermissibly content [*1149] based regulation of protected expressive conduct. n220 Unlike the Florida Supreme Court, the South Carolina Supreme Court added that even if it were to limit the construction of the statute to fighting words as the state urged, the statute would still be unconstitutional. n221 Like the intermediate appellate court in T.B.D. I, the Ramsey court did not consider whether any of the R.A.V. exceptions would have saved the statute under a limiting construction. n222

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n217 State v. Ramsey, 430 S.E.2d 511 (S.C. 1993).

n218 T.B.D. I, 638 So. 2d at 166 (quoting Fla. Stat. Ann. section 876.18 (West 1993)).

n219 Ramsey, 430 S.E.2d at 513 n.1 (quoting S.C. Code Ann. section 16-7-120 (Law. Co-op. 1985)). In relevant part, the statute read as follows:

> It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part, without first obtaining written permission of the owner . . . .

Id. (quoting S.C. Code Ann. section 16-7-120 (Law. Co-op. 1985)).

n220 See id. at 514 "[The statute] reflects the legislature's disapprobation of the ideas a burning cross represents. . . . Government may not prohibit the expression of ideas simply because society finds the ideas themselves to be offensive." Id. (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

n221 Id.; cf. T.B.D. II, 656 So. 2d at 481. "[The statute] prevents only the use of those fighting words symbolically conveyed by a burning cross. The government may not selectively limit proscribable speech that communicates . . . messages of racial or religious intolerance." Ramsey, 430 S.E.2d at 514.

n222 Ramsey, 430 S.E.2d at 514. The Ramsey court also declared unconstitutional a companion intimidation statute on overbreadth grounds. Id. at 515 (citing S.C. Code Ann. section 16-11-550 (Law. Co-op. 1985)).

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In State v. Talley, n223 the Washington Supreme Court examined the constitutionality of a malicious harassment statute. n224 The statute provided that a person was guilty of malicious harassment if he or she committed certain acts against an individual on the basis of "'that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap.'" n225 Subsection 2 of the statute further provided that the burning of a cross or defacement of the victim's property "'with symbols or words . . . which traditionally connote hatred or threats'" n226 represented a per se violation. n227 Subsection 3 of the statute assigned a felony status to malicious harassment. n228

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n223 State v. Talley, 858 P.2d 217 (Wash. 1993).

n224 Id. at 220-21.

n225 Id. at 220 (quoting Wash. Rev. Code section 9A.36.080(1) (1989)).

n226 Id. at 221 (quoting Wash. Rev. Code section 9A.36.080(2) (1989)).

n227 Id.

n228 Talley, 858 P.2d at 221. For the wording of the entire Washington statute, see id. at 220-21 (quoting Wash. Rev. Code section 9A.36.080 (1989)).

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The Talley court ruled that subsection 2 fell "squarely within the prohibitions of R.A.V. because like the St. Paul Ordinance, [the Washington statute] criminalized symbolic speech that expressed disfavored viewpoints." n229 "Even if construed to address only fighting words, as the Minnesota Supreme Court did with the St. Paul Ordinance, the statute is still unconstitutional under . . . R.A.V. . . . because [*1150] even fighting words may not be regulated based on their content." n230 Notwithstanding the Talley court's reliance on R.A.V. in ruling that subsection 2 was impermissibly content-based, it did not consider the applicability of the R.A.V. exceptions, just as the T.B.D. I and Ramsey courts did not. n231

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n229 Id. at 231.

n230 Id.

n231 Id.; see also supra notes 211, 222 and accompanying text. The Talley court did refer to the R.A.V. exceptions in ruling that subsection 1 permissibly regulated conduct in the form of a penalty enhancement statute. Talley, 858 P.2d at 225. Indeed, the Washington statute, in totality, comprised an unusual hybrid between a penalty enhancement statute and a statute that regulated expression. See Wash. Rev. Code section 9A.36.080 (1989). It was a penalty enhancement statute because "absent prohibited victim selection, the conduct described in subsections (1)(a), (b), and (c) is punishable elsewhere in state law . . . as misdemeanor violations. [Under subsection (3),] the criminal conduct is punishable as a felony." Talley, 858 P.2d at 222 (citing Wash. Rev. Code section 9A.36.080(3) (1989)). The Washington statute's constitutional deficiency resided in subsection 2, which impermissibly alluded to specific expressive acts within the scope of the enhancement provision. Id. at 221, 231 (citing Wash. Rev. Code section 9A.36.080(2) (1989)). To this extent, the Washington statute resembled a hate-crime ordinance regulating expression. See supra note 185. The constitutionality of enhancement statutes will be discussed in greater detail, both generally and with specific regard to Talley in infra part IV.C.

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2. Statutory Classification

The statutes in Vawter, Sheldon, T.B.D., Ramsey, and Talley all involved substantially the same concept: a content-based proscription of expressive conduct. n232 The statute in Vawter proscribed the placement of certain symbols "'including, but not limited to[,] a burning cross,'" n233 on public or private property that "'exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion.'" n234 In a similar fashion, the Talley statute rendered cross burning and certain kinds of property defacement per se felonious violations of its malicious harassment statute when "'directed toward, a person's race, color, religion, ancestry, national origin} or

mental, physical, or sensory handicap.'" n235 Both the Vawter and Talley statutes, like [*1151] the St. Paul ordinance, were content-based in that they "prohibited speech solely on the basis of the subjects the speech addresses." n236

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n232 See supra part IV.B.1.

n233 Vawter, 642 A.2d at 352 (alteration in original) (quoting N.J. Stat. Ann. section 2C:33-10 (West 1991)).

n234 Id. (quoting N.J. Stat. Ann. section 2C:33-11 (West 1991)). Section 11 of the Vawter statute was narrower than section 10 in the sense that section 11 referred to the defacement of or damage to property used only for certain purposes, whereas section 10 made no such distinction. Id.; see also supra note 191 and accompanying text.

n235 Talley, 858 P.2d at 220 (quoting Wash. Rev. Code section 9A.36.080(1) (1989)).

n236 R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (footnote omitted). This kind of content-based discrimination is what the R.A.V. concurrence characterized as an "'underbreadth' creation that serves no desirable function." Id. at 402 (White, J., concurring in the judgment).

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The Talley statute engaged in an additional form of content-based discrimination where subsection 2 specifically referred to cross burning and certain forms of property defacement "'with symbols or words . . . which historically or traditionally connote hatred or threats toward the victim.'" n237 The R.A.V. and Vawter statutes, in contrast, did not discriminate on the basis of specific forms of expression but rather exclusively on the basis of those to whom the expression was directed. n238 The Talley statute was content-based because it discriminated both on the basis of its proscriptions against specific forms of expression, as well as on the basis of those to whom the expression was addressed. n239

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n237 Talley, 858 P.2d at 221 (quoting Wash. Rev. Code section 9A.36.080(1) (1989)).

n238 Both the R.A.V. and Vawter statutes cited such expressive symbols as burning crosses and Nazi swastikas as examples using the "including, but not limited to" prefatory language. See R.A.V., 505 U.S. at 380 (citing St. Paul, Minn., Leg. Code section 292.02 (1990)); Vawter, 629 A.2d at 352 (citing N.J. Stat. Ann. section 2C:33-10 to 11 (West 1991)).

n239 See supra notes 223-31 and accompanying text. Still, in a somewhat awkward manner, the Talley court said that the statute was "overbroad because it inhibited free speech on the basis of its content." Talley, 858 P.2d at 221 (emphasis added).

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The statutes in Sheldon, Ramsey, and, according to a Florida intermediate court of appeals, n240 T.B.D. I, were content-based because they discriminated exclusively on the basis that they proscribed specific kinds of expressive conduct. n241 In Sheldon, the statute referred to the burning of "'crosses or other religious symbols.'" n242 The Ramsey statute proscribed a "'burning or flaming cross or any manner of exhibit thereof.'" n243 In relevant part, the T.B.D. statute made the same proscription as the Ramsey statute. n244

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n240 See supra notes 205-11 and accompanying text.

n241 See supra notes 196-211, 217-22 and accompanying text.

n242 Sheldon, 629 A.2d at 756 (quoting Md. Ann. Code art. 27, section 10A (1992)).

n243 Ramsey, 430 S.E.2d at 513 n.1 (quoting S.C. Code Ann. section 16-7-120 (Law. Co-op. 1985)).

n244 See T.B.D. I, 638 So. 2d at 166 (citing Fla. Stat. Ann. section 876.18 (West 1993)).

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These cases suggest that courts have applied R.A.V. to two classes [*1152] of statutes regulating expression. One class of statutes--seen in R.A.V. and Vawter--served to proscribe limitless forms of expressive conduct that conveyed "messages of 'bias-motivated' group hatred." n245 The forms of expression that the St. Paul ordinance addressed were determined on the basis of "'race, color, creed, religion or gender.'" n246 The statute in Vawter referred to subjects which were determined on the basis of "'race, color, creed, or religion.'" n247 Both statutes also required that the expressive conduct satisfy an emotive threshold when specifically addressed to these subjects. n248 Neither statute delimited the kind of expressive conduct it proscribed, provided such conduct was addressed to an individual on one of the disfavored categorical bases and satisfied the statutory emotive threshold. n249

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n245 R.A.V., 505 U.S. at 392.

n246 Id. at 380 (citing St. Paul, Minn., Leg. Code section 292.02 (1990)); see also supra note 79 and accompanying text.

n247 Vawter, 642 A.2d at 352 (quoting N.J. Stat. Ann. section 2C:33-11 (West 1991)); see also supra note 191 and accompanying text.

n248 The St. Paul ordinance proscribed expressive conduct that "'aroused anger, alarm or resentment.'" R.A.V., 505 U.S. at 380 (quoting St. Paul, Minn., Leg. Code section 292.02 (1990)). The Vawter statute, however, proscribed expressive conduct that "'exposed another to threats of violence, contempt or hatred.'" Vawter, 642 A.2d at 352 (quoting N.J. Stat. Ann. section 2C:33-10

(West 1991)).

n249 See supra notes 79, 191 and accompanying text. Both statutes provided examples of proscribable expressive conduct, but neither statute was limiting in its language. See supra notes 79, 191, 238. Notwithstanding the language of the R.A.V. statute, St. Paul conceded that an intent of the statute was to pronounce legislatively the content of the message conveyed by cross burning. R.A.V., 505 U.S. at 393.

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The class of statutes seen in Sheldon, Ramsey, and T.B.D., in contrast, did not require that the proscribed acts satisfy an emotive threshold such as the "arousal of anger" or "exposure to hatred." n250 Nor did they explicitly define a list of disfavored topics such as race or gender. n251 In relevant part, these statutes only proscribed the unauthorized placement of a burning cross. n252

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n250 See supra notes 197, 208, 219 and accompanying text.

n251 See supra notes 197, 208, 219 and accompanying text. Instead, the courts in Sheldon, Ramsey, and T.B.D. I inferred that the statutes discriminated on the disfavored topics of race or religion. "Those who openly burn crosses do so fully cognizant of the controversial racial and religious messages which such acts impart." Sheldon, 629 A.2d at 757. "The government may not selectively limit speech that communicates, as does a burning cross, messages of racial or religious intolerance." Ramsey, 430 S.E.2d at 514 (citing R.A.V., 505 U.S. at 393); see also T.B.D. I, 638 So. 2d at 166-67.

n252 See supra notes 197, 208, 219 and accompanying text. The Sheldon statute also referred to "other religious symbols." See supra note 197 and accompanying text.

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The R.A.V. Court held that the objectionable aspect of the St. Paul ordinance was that it targeted messages on the basis of specifically defined content. n253 It was on this basis that the Vawter court struck down the New Jersey statute. n254

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n253 R.A.V., 505 U.S. at 396 ("The only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." (footnote omitted)).

n254 Vawter, 642 A.2d at 360 ("Inasmuch as the language of [the statutes] limit[] their scope to the disfavored topics of race, color, creed, and religion, the statutes offend the First Amendment.").

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Like the courts in R.A.V. and Vawter, the courts in Sheldon, Ramsey, and T.B.D. I ruled that their respective statutes were impermissibly content-based. n255 Unlike the R.A.V. and Vawter courts, which based their rulings on the assertion that a city or state may not selectively proscribe a subclass of disfavored topics within what is otherwise a larger class of proscribable expression, n256 the Sheldon, Ramsey, and T.B.D. I courts based their rulings on the notion that cross burning "conveys protected ideas . . . and the First Amendment mandates that government may not prohibit the expression of such ideas." n257 The courts in these three cases said that limiting constructions to a proscribable class of expression such as fighting words would not save the statutes because they prohibit "only one type of [proscribable expressive] conduct." n258

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n255 See supra notes 198, 210, 220 and accompanying text.

n256 See generally R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); State v. Vawter, 642 A.2d 349 (N.J. 1994).

n257 Ramsey, 430 S.E.2d at 514; see also T.B.D. I, 638 So. 2d at 167 ("[The statute] implicates First Amendment considerations."); Sheldon, 629 A.2d at 757 ("The burning of a cross or other religious symbols is 'speech' in the contemplation of the First Amendment.").

n258 T.B.D. I, 638 So. 2d at 169; see also Ramsey, 430 S.E.2d at 514; Sheldon, 629 A.2d at 760-61.

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Sheldon, Ramsey, and T.B.D. I implied that a court may apply the R.A.V. prohibition against content discrimination of proscribable expression not only when the content discrimination occurs on the basis of disfavored subject matter, as seen in R.A.V. and Vawter, n259 but also when it targets a specific form of expression, such as cross burning. n260

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n259 See supra notes 253-54 and accompanying text.

n260 See supra note 252 and accompanying text. The R.A.V. Court did not appear to contemplate this latter class of statutes. See R.A.V., 505 U.S. at 392. As noted, the Talley statute represented a hybrid between the two aforementioned classes of statutes. See supra notes 225-28. The Washington court's difficulty with the statute resided in section 2's proscriptions against certain kinds of expressive conduct. Talley, 858 P.2d at 230-31 (citing Wash. Rev. Code section 9A.36.080 (1989)). To this end, the Talley court was more closely aligned with the courts in Sheldon, Ramsey, and T.B.D. I. See supra notes 196-211, 217-31 and accompanying text. It should be reiterated that none of the courts in these four cases actually construed the statute as only reaching fighting words. See supra notes 200, 209, 220, 230-31. The courts in all four cases, however, made such a limiting construction the predicate to their R.A.V. analyses. See, e.g., Ramsey, 430 S.E.2d at 514 ("We discern that

we cannot cure the unconstitutionality of [the statute] by such a construction.").

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The post-R.A.V. analysis of the Sheldon-Ramsey-T.B.D. class of statutes appeared fairly well settled until June 1995 when the Florida Supreme Court issued its ruling in T.B.D. II. n261 Unlike the lower court, the T.B.D. II court actually limited the reach of the Florida statute to the proscribable classes of fighting words and threats of violence. n262 The T.B.D. II court asserted that the R.A.V. Court "held the [St. Paul] ordinance invalid because it played favorites: Rather than proscribing certain types of 'fighting words' across the board, the ordinance prohibited such words . . . only where the words may offend due to 'race, color, creed, religion, or gender.'" n263 The T.B.D. II court then stated that the Florida statute "comported with R.A.V. because the Florida prohibition . . . cuts across the board evenly. No mention is made of any special topic such as race, color, creed, religion or gender." n264

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n261 See supra notes 212-16 and accompanying text.

n262 See supra note 214 and accompanying text. The Minnesota Supreme Court also limited the reach of the St. Paul statute to fighting words. See supra note 81. It did so because of the following specific modifying language of the statute: "arouses anger, alarm or resentment in others." R.A.V., 505 U.S. at 380 (citing In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn.), cert. granted sub nom. R.A.V. v. City of St. Paul, 501 U.S. 1204 (1991), and rev'd, 505 U.S. 377 (1992)). The T.B.D. II court's limiting construction, in contrast, was based on its assessment that a "flaming cross erected by intruders on one's property 'inflicts real injury' on the victim in the form of fear and intimidation and also 'tends to incite an immediate breach of the peace.'" T.B.D. II, 656 So. 2d at 481 (alteration in original) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). This also contrasts with the Sheldon, Ramsey, and T.B.D. I courts, which made such a limiting construction the theoretical predicate to their R.A.V. analyses. See supra notes 196-211, 217-31 and accompanying text. The degree of discretion that a court may exercise in determining whether a statute is limited to a class of proscribable expression such as fighting words is a critical issue left unresolved by, yet inherent in, the R.A.V. holding. See supra notes 135-37 and accompanying text.

n263 T.B.D. II, 656 So. 2d at 481.

n264 Id.

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In essence, the T.B.D. II court interpreted the R.A.V. holding in a fashion that was entirely antithetical to the decisions in Sheldon, Ramsey, T.B.D. I, and Talley. n265 Effectively, the T.B.D. II court asserted that the R.A.V. prohibition against content discrimination of proscribable expression only

applied to the topic-oriented R.A.V.-Vawter class of statutes and not to the Sheldon-Ramsey-T.B.D. class of statutes, which targeted a specific kind of expressive conduct such as cross burning. n266 Even more remarkable is that the South Carolina and Florida Supreme Courts examined virtually identical statutes and rendered opposing judgments. n267

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n265 See supra notes 196-211, 217-31 and accompanying text.

n266 See supra notes 197, 208, 219 and accompanying text.

n267 Compare T.B.D. II, 656 So. 2d at 482 with Ramsey, 430 S.E.2d at 516. The fundamental difference between the Florida and South Carolina statutes was that the former proscribed an unauthorized cross burning only "'on the property of another,'" while the latter proscribed such a cross burning both "'in a public place'" and "'on the property of another.'" See supra notes 218-19 and accompanying text. In contrast to the Florida and South Carolina statutes, the Maryland statute proscribed the unauthorized burning of any religious symbol anywhere within the state. See supra note 197 and accompanying text. Of the three statutes, therefore, the Florida statute was the most narrow in scope and the Maryland statute was the most sweeping. Cf. supra notes 197, 208, 219 and accompanying text; see also supra note 262 (noting that, in choosing to limit the construction of a statute, a court appears to enjoy a degree of latitude).

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In light of T.B.D. II, a city or state may now construct a statute that is consistent with the Sheldon-Ramsey-T.B.D. model and argue that, like the Florida statute, it only reaches fighting words and does not violate R.A.V. since "no mention is made of any special topic such as race, color, creed, religion or gender." n268 An opponent to such a statute would pursue the reasoning used in Sheldon, Ramsey, and the T.B.D. II dissent. n269 The judicial outcome would depend on where a court's [*1156] sympathies rests.

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n268 T.B.D. II, 656 So. 2d at 481. Presumably, such a hypothetical statute need not target cross burning in particular, or fighting words, in general. It could conceivably target any subset of verbal expressions or expressive conduct within a larger class of proscribable expression, provided that the statute were to make no reference to an array of disfavored topics such as race or gender. See id. Of course, that some groups are more offended by certain fighting words than other groups does not seem to have been addressed by the T.B.D. II majority. See id. at 479-82.

n269 See supra notes 196-204, 217-22 and accompanying text. In T.B.D. II, Judge Overton issued a lone dissenting opinion in which he said that "contrary to the majority's conclusion, it is not just the subjects to which protection is afforded that must be neutral, it also is the expressive activity itself that must be prohibited in a neutral fashion." T.B.D. II, 656 So. 2d at 483 (Overton, J., dissenting) (emphasis added).

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The T.B.D. II ruling underscores a fundamental question left unanswered by the R.A.V. Court. Specifically, does the R.A.V. prohibition against content discrimination within a proscribable class of expression include those statutes that specifically proscribe a form of expression, such as cross burning, without direct reference to categories of expression that are determined on the bases of identifying characteristics such as race or gender? n270

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n270 In 1996, the United States Supreme Court declined to answer this question. See T.B.D. v. Florida, 116 S. Ct. 1014, 1015 (1996) (denial of petition for writ of certiorari). On October 13, 1995, attorneys for the losing defendant in T.B.D. II had filed a petition for writ of certiorari with the United States Supreme Court. T.B.D. v. Florida, 64 U.S.L.W. 3401 (U.S. Dec. 5, 1995) (No. 95-618). The following two questions were presented for review: "(1) Is decision of Florida Supreme Court . . . directly contrary to . . . the decision in R.A.V. . . . and other state court decisions . . . ? (2) Does [the Florida statute] violate First Amendment because it is content-based regulation that punishes only one type of expressive conduct . . . ?" Id. The United States Supreme Court denied the petition for writ of certiorari without comment. See T.B.D. v. Florida, 116 S. Ct. 1014, 1015 (1996). As such, any effort to discern a subtextual meaning in the Court's denial serves only as speculation. What is clear, however, is that the Court chose not to accept an opportunity to reexamine the R.A.V. holding.

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3. Application of the R.A.V. Exceptions

The R.A.V. Court noted that the "prohibition against content discrimination . . . applies differently in the context of proscribable speech than in the area of fully protected speech." n271 The R.A.V. Court then articulated a series of exceptions in which content discrimination of wholly proscribable speech is permissible. n272 This suggests that a prerequisite to the application of the R.A.V. exceptions is a real or presumed finding that the content-based statute in question affects a category of proscribable expression such as fighting words. n273 The R.A.V. [*1157] Court further implied that once a real or presumed finding were made, a court would then examine the statute's constitutionality with respect to the R.A.V. exceptions before proceeding to traditional strict scrutiny analysis. n274

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n271 R.A.V., 505 U.S. at 387.

n272 See id. at 387-90; see also supra notes 96-110 and accompanying text.

n273 The R.A.V. language regarding whether the exceptions only apply within the context of proscribable expression is ambiguous. See R.A.V., 505 U.S. at 382-90. It would appear that the language of the first exception only refers to "content discrimination that consists entirely of the very reason the entire class of speech at issue is proscribable." Id. at 388. Therefore, the first exception should only apply to those statutes that selectively proscribe a subset of a larger class of proscribable expression. See supra notes 99-103 and accompanying text for a discussion of the first R.A.V. exception. The

"secondary effects" and "sweeping up" exceptions appear to be exceptions to a more general prohibition against content discrimination of any sort. See R.A.V., 505 U.S. at 394-96. In asserting the "secondary effects" exception, the R.A.V. Court cited Renton v. Playtime Theatres, Inc., which did not involve an issue of proscribable expression such as obscenity. R.A.V., 505 U.S. at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)). See supra notes 104-05 and accompanying text for a discussion of the "secondary effects" exception. The R.A.V. Court also prefaced its discussion of the "secondary effects" exception as "another valid basis for according differential treatment to even a . . . subclass of proscribable speech," implying that the "secondary effects" exception also applies to classes of expression that are not ordinarily proscribable. R.A.V., 505 U.S. at 389 (emphasis added). But see Rappa v. New Castle County, 18 F.3d 1043, 1069 (3d Cir. 1994) ("A majority of the Supreme Court has never explicitly applied the [secondary effects] analysis to political speech." (footnote omitted (citing Boos v. Barry, 485 U.S. 312 (1988)))). With respect to the "sweeping up" exception, the R.A.V. Court said that a law against treason may legitimately "sweep up" a subcategory of words that convey the nation's secrets, even though such words do not necessarily fall within a proscribable class of expression. R.A.V., 505 U.S. at 389. See supra notes 106-08 and accompanying text for a discussion of the "sweeping up" exception. The final, catch-all exception appears only to apply "where totally proscribable speech is at issue." R.A.V., 505 U.S. at 390.

Thus, a reasonable interpretation of the R.A.V. language would be that the "secondary effects" and "sweeping up" exceptions are general exceptions that also apply to content discrimination within a larger class of proscribable expression, and that the first and final, catch-all exceptions only apply to content discrimination within a proscribable class of expression. Still, the Court's prefatory language suggests that the exceptions are valid because "the prohibition against content discrimination . . . is not absolute. It applies differently in the context of proscribable speech," implying a mantle of exclusivity. Id. at 387. See supra notes 24-34 and accompanying text for a discussion of those categories of expression outside the traditional purview of First Amendment protection. An even greater prerequisite to application of the R.A.V. exceptions is that the statute in question is content-based in the first place. R.A.V., 505 U.S. at 387. If it were not, there would be no need for further analysis under R.A.V.

n274 The R.A.V. Court did not explicitly state that a court must apply the exceptions. See R.A.V., 505 U.S. at 387-90. The Court's opinion, however, suggests such a process. See id.

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In this regard, the courts in Talley, Sheldon, Ramsey, and T.B.D. I either did not apply the R.A.V. exceptions or applied them inappropriately. In Talley, for example, the court said that "if a regulation of . . . proscribable speech is content-based, the court applies the same stringent standard of review that it applies to all other contentbased regulations." n275 The Talley court then added that even if it were [*1158] to limit the reach of its statute to fighting words, "the statute is still unconstitutional under the R.A.V. analysis because even fighting words may not be regulated based on their content." n276 The Talley court made no allusion to the exceptions provided by the R.A.V. general rule. n277 Similarly, the courts in Ramsey and T.B.D. I did not apply the R.A.V. exceptions. n278

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n275 Talley, 858 P.2d at 231 (citing Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 197 (1984)).

n276 Id.

n277 See id. at 230-31. Indeed, the Talley court did not even apply a traditional

strict scrutiny analysis, which accompanies the assessment of content-based regulations, notwithstanding the appropriateness of such an analysis. See id.; see also supra note 23 and accompanying text.

n278 See Ramsey, 430 S.E.2d at 514; T.B.D. I, 638 So. 2d at 169. Both courts merely said that even if they limited their states' respective statutes as only reaching fighting words, the statutes would still be impermissibly content-based regulations of unprotected expression. See Ramsey, 430 S.E.2d at 514; T.B.D. I, 638 So. 2d at 169. The courts made no mention of the exceptions. See Ramsey, 430 S.E.2d at 514; T.B.D. I, 638 So. 2d at 169. Like the Talley court, the Ramsey court did not apply traditional strict scrutiny analysis to its statute. See Ramsey, 430 S.E.2d at 514. The T.B.D. I court did so in passing. T.B.D. I, 638 So. 2d at 169.

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In Sheldon, the court analyzed the Maryland statute with respect to the R.A.V. exceptions despite the fact that the court had not limited or even extended the reach of the statute to a subclass of proscribable expression, an apparent prerequisite. n279 To this end, the Sheldon court tentatively suggested that the R.A.V. exceptions applied to all contentbased regulations. n280 The Sheldon court apparently recognized that the final, R.A.V. catch-all exception only applied "'where totally proscribable speech was at issue.'" n281

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n279 Sheldon, 629 A.2d at 760-62; see also supra notes 201, 273-74 and accompanying text.

n280 Sheldon, 629 A.2d at 760. "Importantly for the instant case, the [R.A.V.] Court outlined . . . exceptions to the usual presumption against the constitutionality of content-based statutes . . . ." Id. The Sheldon court then acknowledged that these exceptions "hinged on the fact that the Court has long recognized that . . . narrow categories of 'speech' . . . do not enjoy First Amendment protection." Id.; see also R.A.V., 505 U.S. at 387-88. The Sheldon court then seemed to contradict this latter concession by proceeding to analyze the applicability of the "secondary effects" exception, even though it had made no finding regarding the reach of the Maryland statute. Sheldon, 629 A.2d at 761-62.

n281 Sheldon, 629 A.2d at 761 (quoting R.A.V., 505 U.S. at 390). The Sheldon court then rejected this exception because "the State had not made the case, as Minnesota did, that the burning of religious symbols constituted proscribable fighting words." Id. at 762. Even if Maryland had made such an argument

successfully, it is unclear whether the Sheldon court would have applied this catch-all exception to the statute.

It appears that the final, catch-all exception affords a court, sympathetic to a state's position, a convenient means by which it might salvage a statute under review. See R.A.V., 505 U.S. at 390. Specifically, a court may declare that a contentbased statute, reaching only a subclass of proscribable expression, is otherwise constitutional because "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id.; see also supra notes 109-10. The T.B.D. II court, proceeding one step further, declared that the Florida statute, while limited to proscribable expression, was not content-based, thus obviating any consideration of the R.A.V. exceptions altogether. See supra notes 21216 and accompanying text; see also supra note 273 (noting that a prerequisite to application of the R.A.V. exceptions is that the statute under review be content-based).

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Moreover, it is paradoxical that in failing to allude to the R.A.V. exceptions, the Talley court may have unwittingly applied the first R.A.V. exception. n282 Specifically, the R.A.V. Court provided that content-based regulations of proscribable expression are permissible "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." n283 With respect to fighting words, the R.A.V. Court noted that "the reason why fighting words are categorically excluded . . . is . . . that their content embodies a particularly intolerable . . . mode of expression." n284 The R.A.V. Court further noted that the St. Paul ordinance did not fall under this first exception because "St. Paul had not singled out an especially offensive [or intolerable] mode of expression." n285 Yet, the Talley court struck down subsection 2 of the Washington statute because, "like the St. Paul Ordinance, [the Washington statute] criminalized symbolic speech that expresses disfavored viewpoints in an especially offensive manner." n286

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n282 For a discussion of the Talley court's failure to analyze the applicability of the R.A.V. exceptions, see supra text accompanying note 231.

n283 R.A.V., 505 U.S. at 388. For a discussion of this exception, see supra notes 99-103 and accompanying text.

n284 R.A.V., 505 U.S. at 393.

n285 Id. at 393 (emphasis added).

n286 Talley, 858 P.2d at 231 (emphasis added) (citing Wash. Rev. Code section 9A.36.080(2) (1989)). Such an analysis suggests an inadvertent and erroneous application of the first R.A.V. exception. The Talley court made this statement under the presumption that the statute only reached fighting words. Id. at 230-31. It is also peculiar that the Talley court asserted that the St. Paul ordinance "criminalized symbolic speech that expresses disfavored viewpoints

in an especially offensive manner." Id. at 231. The R.A.V. Court reached the entirely opposite conclusion. R.A.V., 505 U.S. at 393 ("St. Paul has not singled out an especially offensive mode of expression . . . .").

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Even a deliberate consideration of the first R.A.V. exception may be confused. In assessing the applicability of the first R.A.V. exception to [*1160] the Maryland statute, the Sheldon court asserted that had the state "cast the cross burning law as an attempt to regulate only the most inciteful of constitutionally proscribable fighting words, it would have commited the same mistake as [St. Paul] in selecting only certain socially charged fighting words for prosecution." n287 Yet, the first R.A.V. exception allows a city or state to regulate certain fighting words precisely because they represent a most inciteful and "especially offensive mode of expression." n288 St. Paul's mistake, moreover, was not that it selected only certain socially charged fighting words, but that it "proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance." n289

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n287 Sheldon, 629 A.2d at 761.

n288 R.A.V., 505 U.S. at 393.

n289 Id. at 393-94 (emphasis added). Had St. Paul successfully argued that its statute only regulated the most egregious fighting words, then presumably the Court would have saved it by way of the first R.A.V. exception. See id. Interestingly, the T.B.D. II court employed this reasoning when it saved the Florida statute without any reference to the R.A.V. exceptions. Specifically, the Florida Supreme Court said that "[cross burning] is proscribed because it is one of the most virulent forms of . . . 'fighting words.'" T.B.D. II, 656 So. 2d at 481.

Indeed, it would seem entirely plausible that the first R.A.V. exception should apply to those statutes that exclusively proscribe a particular kind of expressive conduct--those statutes seen in Sheldon, Ramsey, and T.B.D. I which do not refer to an array of disfavored topics defined on such bases as race or gender, but merely proscribe a particular form of conduct such as cross burning. See supra notes 197, 208, 219, 240-44, 250-52, 255-60 and accompanying text for discussion of this type of statute. The R.A.V. Court seemed to indicate that the St. Paul ordinance did not qualify under the first exception because it proscribed fighting words of any mode that addressed the disfavored topics. R.A.V., 505 U.S. at 393-94. In contrast, the statutes in Sheldon, Ramsey, and T.B.D. I specifically proscribed the burning of crosses and other religious symbols. See supra notes 197, 208, 219 and accompanying text. One might argue, under R.A.V., that such expressive conduct represents a "particularly intolerable" mode of fighting words. See R.A.V., 505 U.S. at 393-94. None of the states in these three cases made such an argument.

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Two California cases provide an additional perspective on how courts have applied the R.A.V. exceptions to hate-crime statutes regulating speech. In re Steven S. n290 examined the constitutionality of a state hate-crime statute

that proscribed particular acts of terror. n291 The [*1161] court reasoned that the statute targeted unprotected speech that fell within the fighting words doctrine in a content-based manner. n292 The In re Steven S. court, however, distinguished the statute from the St. Paul ordinance. n293 Specifically, it said that the statute targeted a particularly egregious form of cross burning on private property, whereas the St. Paul ordinance "applied to any cross burning, not just the act we call malicious cross burning." n294 The In re Steven S. court noted that this distinction qualified the California statute for at least three of the R.A.V. exceptions. n295 It said that the first exception applied because the "Legislature has singled out an especially offensive mode of expression: not any cross burning . . . but a 'threatening' cross burning on a victim's private property." n296 The In re Steven S. court said that the [*1162] California statute also qualified under the second R.A.V. exception because the "statute targets secondary effects of malicious cross burning--the infliction upon a specific victim of immediate fear and intimidation and a threat of future harm--rather than the racist message conveyed." n297 The In re Steven S. court further stated that the California statute satisfied the final, catch-all exception that permits content-based discrimination of a proscribable class of expression when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." n298

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n290 In re Steven S., 31 Cal. Rptr. 2d 644 (Ct. App. 1994).

n291 Id. at 646. Section 11411(c) of the California Penal Code, declares "any person who burns or desecrates a cross or other religious symbol . . . for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard . . . shall be punished by imprisonment." Cal. Penal Code section 11411(c) (West 1995). The statute defines "terrorize" as "to cause a person of ordinary emotions and sensibilities to fear for personal safety." Id. The In re Steven S. court called this form of cross burning "malicious." In re Steven S., 31 Cal. Rptr. 2d at 650.

n292 In re Steven S., 31 Cal. Rptr. 2d at 648-49. That the court made such a ruling rendered In re Steven S. distinct from Talley, Sheldon, Ramsey, and T.B.D. I, in which the courts merely said that such a narrow construction would not save the statutes. See supra notes 196-211, 217-31 and accompanying text. The In re Steven S. statute is similar to the Talley statute because it adopts characteristics of both classes of statutes. See supra part IV.B.2. The statute in In re Steven S. is like the Sheldon-Ramsey-T.B.D. class of statutes in that it specifically proscribes a particular form of fighting words--burning of crosses and other religious symbols--and not like the R.A.V.-Vawter class, a limitless array of fighting words that address certain statusoriented disfavored topics. See supra part IV.B.2; see also Cal. Penal Code section 11411 (West 1995). The California statute is like the R.A.V. and Vawter statutes in that it requires an emotive impact of "terror" on its victim. See supra notes 245-49 and accompanying text; see also Cal. Penal Code section 11411 (West 1995).

n293 In re Steven S., 31 Cal. Rptr. 2d at 649-50.

n294 Id. at 650. The St. Paul ordinance did not apply to any cross burning, but only to such cross burning that "'aroused anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.'" R.A.V., 505

U.S. at 380 (quoting St. Paul, Minn., Leg. Code section 292.02 (1990)).

n295 In re Steven S., 31 Cal. Rptr. 2d at 650-51.

n296 Id. at 650 (citing R.A.V., 505 U.S. at 393). For a discussion of the first R.A.V. exception, see supra notes 99-103 and accompanying text. In citing the applicability of this exception, the In re Steven S. court said that the R.A.V. Court had indicated that cross burnings, in general, were "merely obnoxious." In re Steven S., 31 Cal. Rptr. 2d at 650. A careful reading of the R.A.V. majority opinion reveals that the language "merely obnoxious" did not refer to cross burnings, per se, but to an example of the kind of expressive conduct that would not rise to the level of the first exception. See R.A.V., 505 U.S. at 393. Moreover, the In re Steven S. court appeared to suggest by this reasoning that cross burnings in general would not qualify as particularly offensive fighting words under the first R.A.V. exception. See In re Steven S., 31 Cal. Rptr. 2d at 650-51; see also supra notes 99-103, 291.

In re Steven S. also appeared to suggest that the emotive threshold attendant to a statute could determine its qualification for the first R.A.V. exception. See In re Steven S., 31 Cal. Rptr. 2d at 650. In this regard, given its emotive threshold of "'threats of violence, contempt or hatred,'" State v. Vawter, 642 A.2d 349, 352 (N.J. 1994) (quoting N.J. Stat. Ann. section 2C:33-10 (West 1991)), the Vawter statute might have been saved by the first R.A.V. exception. See id. However, the statute's array of proscribed topics on the basis of the specific identifying characteristics "'race, color, creed, or religion,'" id. at 359 (quoting N.J. Stat. Ann. section 2C:33-10 (West 1991)), prevented such a result. See id.

n297 In re Steven S., 31 Cal. Rptr. 2d at 650. "The ordinance in R.A.V. targeted any cross burning that . . . '"aroused anger, alarm or resentment."'" Id. at 650-51 (quoting R.A.V., 505 U.S. at 380 (quoting St. Paul, Minn., Leg. Code section 292.02 (1990))). Such an "emotive reaction . . . did not constitute a regulable secondary effect." Id. at 651 (citing R.A.V., 505 U.S. at 394). "The fear and intimidation of the victim of a malicious cross burning crosses the line between emotive reaction and tangible injury." Id.

It appears that the reasoning in In re Steven S. should have applied to the Vawter statute. See supra note 191 and accompanying text. Specifically, the Vawter statute proscribed, among other things, cross burnings that "'exposed another to threats of violence, contempt or hatred.'" Vawter, 642 A.2d at 352 (quoting N.J. Stat. Ann. section 2C:33-10 (West 1991)). According to the California court, an individual's exposure of another to "threats of violence" certainly appeared to "cross[] the line between emotive reaction and tangible injury." In re Steven S., 31 Cal. Rptr. 2d at 651. Yet, the Vawter court said that, like the St. Paul ordinance, the New Jersey statute targeted only the secondary effects of the "'"emotive victimization of a person or persons who are particularly vulnerable."'" Vawter, 642 A.2d at 359 (quoting R.A.V., 505 U.S. at 394 (quoting Brief for Respondent at 28, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (No. 90-7675))). The Vawter court declared that its state's statute was not saved by the "secondary effects" exception because "[regulable] secondary effects do not include the listeners' reactions to speech or the emotive impact of speech." Id. (citing R.A.V., 505 U.S. at 394).

n298 R.A.V., 505 U.S. at 390. The In re Steven S. court stated that "at its core, [malicious cross burning] is an act of terrorism that inflicts pain on

its victim, not the expression of an idea." In re Steven S., 31 Cal. Rptr. 2d at 651 (footnote omitted). The In re Steven S. court also said that all of the R.A.V. exceptions applied to the part of the California statute that referred to the burning of religious symbols in general. Id.

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[*1163]

In re M.S. n299 examined the constitutionality of another California hate-crime statute. n300 Like the statutes in R.A.V. and Vawter, the California statute referred to an array of group-oriented disfavored topics. n301 Unlike the treatments of the statutes previously discussed, however, the California court of appeals limited the reach of its statute not to fighting words, but to the proscribable class of expression known as true threats. n302 While the In re M.S. court said that the California statute was a content-based regulation of a proscribable class of expression, the statute fell within at least three of the R.A.V. exceptions. n303 The In re M.S. court said that the first R.A.V. exception was applicable because the statute "focuses on threats which induce a distinct, greater fear of violence . . . and a greater risk the individual will actually be singled out for harm; hence, its content limitation is therefore justified by precisely the same reasons true threats are outside the First Amendment." n304 The In re M.S. court said that the "secondary effects" excep
[*1164] tion applied to the California statute because it proscribed the secondary effects of "'the act of discrimination and differential treatment based on race or other status--not the thought behind the act.'" n305 Finally, the In re M.S. court said that the California statute fell within the R.A.V. catch-all exception because it was "not calculated to suppress bigoted ideas." n306

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n299 In re M.S., 22 Cal. Rptr. 2d 560 (Ct. App.), aff'd, 896 P.2d 1365 (Cal. 1993).

n300 Id. at 563-64. The statute, section 422.6 of the California State Penal Code, read in relevant part:

"(a) No person . . . shall by force or threat of force, willfully injure, intimidate or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege . . . because of the other person's race, color, religion, ancestry, national origin, or sexual orientation.

. . . .

(c) No person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence . . . and that the defendant had the apparent ability to carry out the threat."

In re M.S., 22 Cal. Rptr. 2d at 563-64 (quoting Cal. Penal Code section 422.6 (West 1985) (amended 1991)).

n301 See In re M.S., 22 Cal. Rptr. at 563-64; see also supra notes 245-49 and accompanying text. It was such "underinclusiveness" that helped render the R.A.V. and Vawter statutes fatally unconstitutional. See supra notes 111-12, 190-95 and accompanying text.

n302 In re M.S., 22 Cal. Rptr. 2d at 568 ("'True threats' have traditionally been punishable without violation of the First Amendment." (citing Watts v. United States, 394 U.S. 705 (1969); Wurtz v. Risley, 719 F.2d 1438, 1441 (9th Cir. 1983))); see also United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976); supra note 30 and accompanying text.

n303 In re M.S., 22 Cal. Rptr. 2d at 570.

n304 Id. at 570-71. For a discussion of the first R.A.V. exception, see supra notes 99-103 and accompanying text. Interestingly, this parallels Justice White's reasoning in asserting that the R.A.V. majority's first exception should apply to the St. Paul statute: "The first exception swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since 'the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination].'" R.A.V., 505 U.S. at 408 (White, J., concurring in the judgment) (second and third alterations in original) (quoting id. at 388).

n305 In re M.S., 22 Cal. Rptr. 2d at 571 (quoting In re Joshua H., 17 Cal. Rptr. 2d 291, 300 (1993)).

n306 Id.

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The California Supreme Court affirmed the lower court's ruling. n307 The California Supreme Court declared that the California statute was "dissimilar in crucial respects to the St. Paul ordinance." n308 The California Supreme Court said that while the St. Paul ordinance clearly regulated expression, the California statute only regulated the conduct of willful interference that incorporated content-based expression within the "proscribable category of true threats." n309 To this extent, the California Supreme Court saved the statute by virtue of R.A.V.'s "sweeping up" and final, catch-all exceptions. n310

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n307 In re M.S., 896 P.2d 1365, 1369 (Cal. 1995).

n308 Id. at 1378.

n309 Id. at 1378-79. According to the California Supreme Court, the statute clearly fell "closer to the conduct end of the expression-conduct continuum." Id. at 1378.

n310 Id. at 1380. The California Supreme Court applied these exceptions without alluding to them. Id. For a discussion of these exceptions, see supra notes 106-10 and accompanying text.

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The foregoing analysis illustrates the inconsistent, capricious, and poorly understood applications of the R.A.V. exceptions. n311 Depending on a particular court, one statute may fail to satisfy the R.A.V. exceptions, while a similar statute may satisfy each R.A.V. exception. n312 Sometimes, courts will not even consider the R.A.V. exceptions. n313 Within the context of hate-crime legislation regulating expression, the absence of a clear, unifying application of these R.A.V. principles beckons for answers to certain key questions. n314 These questions include: [*1165] 1) Must a court actually find that a statute extends or is limited to a proscribable class of expression before it may review the statute under consideration of the exceptions? n315 2) Even if such an actual finding were made, must a court then review the statute in light of the exceptions? n316 3) Did the Court intend the "secondary effects" and "sweeping up" exceptions to be part of one larger exception? n317 4) What is the precise meaning of the first R.A.V. exception? n318 5) What mechanism prevents a state's highest court, which is sympathetic to the legislative purpose of a statute, from simply applying the final, catch-all exception under the guise of a limited construction? n319

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n311 See supra notes 271-310 and accompanying text. The controversial applications of the R.A.V. exceptions extend well beyond these cases. See infra part IV.C-D.

n312 See supra notes 193, 201, 290-310 and accompanying text; see also supra note 108.

n313 See supra notes 277-78 and accompanying text.

n314 "'[R.A.V.] leaves a lot of exceptions. I think all speech codes are open to challenge; I just don't know whether they will hold up when the [Supreme C]ourt makes up its mind what all the exceptions mean.'" David Wallace, Free-speech Advocates Hail Ruling Against Stanford Code: Constitutionality of Calif. Law Tested, Wash. Times, Mar. 21, 1995, at A2 (emphasis added) (quoting Stanford University Law Professor Gerald Gunther).

n315 See supra note 273 and accompanying text.

n316 See supra note 274 and accompanying text.

n317 See supra notes 104-08 and accompanying text.

n318 See supra notes 99-103, 282-89 and accompanying text.

n319 See supra notes 262, 281 and accompanying text.

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C. R.A.V. and Penalty Enhancement Statutes

Almost one year after the Supreme Court spoke in R.A.V., it addressed the constitutionality of hate-crime statutes regulating motive or penalty

enhancement statutes n320 in Wisconsin v. Mitchell. n321 In Mitchell, the Court examined the constitutionality of a Wisconsin penalty enhancement statute that increased the fines and sentences for certain violent crimes when the perpetrator selected the victim on the basis of specific identifying characteristics. n322 Relying on R.A.V., the Wisconsin Supreme Court held that the statute was unconstitutional. n323 "While the [*1166] St. Paul ordinance invalidated in R.A.V. is clearly distinguishable from the Wisconsin . . . statute in that it regulates fighting words rather than merely the actor's biased motive, the [R.A.V.] Court's analysis lends support to our conclusion that the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees." n324 "The [Wisconsin] hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought." n325

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n320 See supra notes 186-87 and accompanying text.

n321 Wisconsin v. Mitchell, 508 U.S. 476 (1993).

n322 Id. at 480. In relevant part, the Wisconsin statute read as follows:

"(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or owner or occupant of that property."

Id. at 480 n.1 (quoting Wis. Stat. section 939.645 (1989-1990) (amended 1992)).

n323 State v. Mitchell, 485 N.W.2d 807, 817 (Wis.), cert. granted, 506 U.S. 1033 (1992), and rev'd, 508 U.S. 476 (1993).

n324 Mitchell, 485 N.W.2d at 815 ("The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance--racial or other discriminatory animus. . . . We conclude that the legislature may not single out and punish that ideological content.").

n325 Id. (footnote omitted).

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In unanimously reversing the Wisconsin court's decision, the United States Supreme Court rejected respondent Mitchell's argument that the statute was not valid because "it punishes his discriminatory motive." n326 The Court said

that motive is a constitutionally legitimate basis on which to regulate. n327 "Title VII . . ., for example, makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex, or national origin.'" n328 "In R.A.V. . . ., we cited Title VII . . . as an example of a permissible content-neutral regulation of conduct." n329

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n326 Mitchell, 508 U.S. at 487.

n327 Id. ("Motive plays the same role under the Wisconsin statute as it does under . . . antidiscrimination laws, which we have previously upheld against constitutional challenge." (citing Roberts v. Jaycees, 468 U.S. 609, 628 (1984); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Runyon v. McCrary, 427 U.S. 160, 176 (1976))).

n328 Id. (quoting 42 U.S.C. section 2000e-2(a)(1) (1988)).

n329 Id.; see also supra notes 107, 160.

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Ultimately, the Mitchell Court drew a sharp distinction between the objectives of the St. Paul ordinance and the Wisconsin statute. n330 "Whereas the ordinance struck down in R.A.V. was explicitly directed at expression . . ., the statute in this case is aimed at conduct unprotected by the First Amendment." n331

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n330 Mitchell, 508 U.S. at 487-88.

n331 Id. at 487 (citation omitted). The Mitchell Court considered the argument that the regulated conduct contained elements of expression. Id. The Court, however, rejected this argument. Id. "A physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." Id. at 484 (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.")); see also supra note 22.

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Thus, in not extending R.A.V. to the Wisconsin statute, the Supreme [*1167] Court created a dichotomy whereby the constitutionality of a hate-crime statute would depend on whether it more closely resembled the impermissibly content-based St. Paul ordinance regulating expression or the permissibly content-based Wisconsin statute n332 providing additional penalties for specific types of criminal acts. n333 The constitutionality of [*1169] the latter type of statute was predicated not on personal belief, per se, but on the illegal manifestation of that belief. n334 While the R.A.V. Court said that a state may not selectively proscribe a subclass of prejudicial expression, the Mitchell Court said that a state may selectively penalize a subclass of prejudicial thought, provided that the thought serves as motivation for criminal conduct. n335 Yet, some believe that such a nice distinction may vitiate the R.A.V. ruling. n336 Others believe [*1170] that R.A.V. and Mitchell are

simply irreconcilable or indistinguishable. n337 Still others believe that the difference between the two cases is substantial. n338 In any event, in the fourteen months after the Mitchell ruling, sixteen states created penalty enhancement legislation. n339

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n332 The Wisconsin statute, in a fashion analogous to the St. Paul ordinance, was content-based because it only applied if the victim belonged to certain groups. See supra note 112 and accompanying text.

n333 In creating the broad dichotomy between hate-crime statutes regulating expression, and penalty enhancement statutes, the Court did not appear to anticipate the narrow dichotomy that exists between the R.A.V.-Vawter and Sheldon-Ramsey-T.B.D. classes of statutes discussed supra part IV.B.2. Nor did the Court appear to expect, in this regard, the even narrower dichotomy between the holdings in Sheldon, Ramsey, and T.B.D. I, and the holding in T.B.D. II. See supra notes 251-70. In the twelve months between the Court's R.A.V. and Mitchell decisions, a number of courts considered the application of R.A.V. in determining the constitutionality of statutes that resembled penalty enhancement ordinances. Cases in which courts upheld the constitutionality of penalty enhancement provisions during this period include: In re Joshua H., 17 Cal. Rptr. 2d 291 (Ct. App. 1993); Dobbins v. State, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992); People v. Miccio, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992); People v. Mulqueen, 589 N.Y.S.2d 246 (N.Y. Crim. Ct. 1992); State v. Plowman, 838 P.2d 558 (Or. 1992), cert. denied, 113 S. Ct. 2967 (1993).

The Plowman court held that the Oregon enhancement statute was "directed against conduct" since it was not "directed against the substance" of speech. Plowman, 838 P.2d at 565. The Oregon court interpreted R.A.V. to distinguish laws "directed against the substance of speech from laws that are directed against conduct." Id. "[R.A.V.] expressly did not rule on the constitutionality . . . of a statute like the one that we consider here." Id.

In Dobbins, a Florida District Court of Appeal held that Florida's enhancement statute was contrary to R.A.V. because "it is only when one acts on such [hatebased] opinion to the injury of another that the Florida statute permits enhancement." Dobbins, 605 So. 2d at 924 (emphasis added).

In Miccio, the New York court stated that the relevant enhancement statutes only became effective through criminal conduct contrary to R.A.V. in which "the activity of the defendant became criminal only when his actions amounted to the specifically proscribed fighting words." Miccio, 589 N.Y.S.2d at 765.

In In re Joshua H., a California Court of Appeal examined the constitutionality of the state penalty enhancement statute. The In re Joshua H. court stated that because the St. Paul ordinance in R.A.V. "regulated 'words' and 'messages,' . . . it clearly implicated the First Amendment." In re Joshua H., 17 Cal. Rptr. 2d at 298. "In contrast, [the California statute] does not regulate speech; it regulates acts of violence intended to interfere with the victim's protected rights. There is a fundamental difference under the First Amendment between speech and conduct . . . ." Id. The California court added that even if the enhancement statute were directed at bigoted thoughts, it "would still pass constitutional muster under the R.A.V. exceptions." Id. at 299.

The common thread of agreement among these courts was that enhancement statutes were directed at conduct and not at speech; they punished the selection of victims, not bigoted thought. See supra discussion this note; see also supra notes 187, 331 and accompanying text. In sharp contrast, aside from the Wisconsin Supreme Court, only two courts during this twelve-month, post-R.A.V. period overturned enhancement statutes. In State v. Wyant, 597 N.E.2d 450 (Ohio 1992), cert. granted and judgment vacated and remanded, 508 U.S. 969 (1993), aff'd in part, rev'd in part, 624 N.E.2d 722 (Ohio), cert. denied, 115 S. Ct. 132, and cert. denied, 115 S. Ct. 133 (1994), the Ohio Supreme Court examined the constitutionality of a statute that provided for enhanced penalties if the perpetrator selected his victim "'by reason of . . . race, color, religion, or national origin.'" Wyant, 597 N.E.2d at 452 (quoting Ohio Rev. Code Ann. section 2927.12 (Anderson 1989)). Referring to the statute in R.A.V., the Ohio court said that the state's penalty enhancement statute was actually a "greater infringement on speech and thought than . . . the St. Paul . . . law[]." Id. at 459. The Wyant court, striking down the Ohio statute, held that the statute punished bigoted motives, and therefore was unlike the ordinance in R.A.V., which targeted only expression. Id. The statute, in the court's view, created a "thought crime"--a brand of viewpoint discrimination more egregious than that practiced by the unconstitutional St. Paul statute. Id. "We agree with Justice Scalia when he observed that the government 'has sufficient means at its disposal to prevent [criminal] behavior without adding the First Amendment to the fire.'" Id. (quoting R.A.V., 505 U.S. at 396).

Another Florida District Court of Appeal found that the Florida enhancement statute was unconstitutional as being void for vagueness. Richards v. State, 608 So. 2d 917 (Fla. Dist. Ct. App. 1992), rev'd and remanded, 638 So. 2d 44, 44-45 (Fla. 1994). Although the statute was not struck down by force of a First Amendment challenge, the Richards court pointed to the Dobbins court's view that such a "challenge was 'troubling' in view of R.A.V." Richards, 608 So. 2d at 922 n.6 (quoting Dobbins, 605 So. 2d at 923).

With the Supreme Court's decision in Mitchell, the constitutionality of pure penalty enhancement statutes became a settled issue. See generally Hate Crimes Laws, supra note 73. Subsequent to Mitchell, the two states in which courts had struck down penalty enhancement statutes reversed earlier rulings. In State v. Stalder, 630 So. 2d 1072 (Fla. 1994), the Florida Supreme Court, in the wake of Mitchell, reconciled the opposing views of Dobbins and Richards. See Stalder, 630 So. 2d at 1072-76. Although the Stalder court said that the Florida enhancement statute "contained elements similar to both the St. Paul ordinance struck down in R.A.V. and the Wisconsin statute upheld in Mitchell," id. at 1076, it ruled that the statute regulated "the selection of a victim[,] . . . conduct that is not protected speech at all." Id. "[The Florida statute] is virtually identical to . . . the valid Wisconsin statute . . . ." Id. Also, in light of Mitchell, the Ohio Supreme Court vacated its earlier Wyant ruling that had struck down the Ohio enhancement statute. See State v. Wyant, 624 N.E.2d 722 (Ohio), cert. denied, 115 S. Ct. 132, and cert. denied, 115 S. Ct. 133 (1994).

Subsequent to Mitchell, original attempts to analogize penalty enhancement statutes to the St. Paul ordinance proved fruitless. In State v. Talley, 858 P.2d 217 (Wash. 1993), the Washington Supreme Court upheld the constitutionality of a state enhancement statute that provided for greater penalties when certain crimes were committed because of "'race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap.'" Talley, 858 P.2d at 220 (quoting Wash. Rev. Code Ann. section 9A-36.080(1) (West 1989)). The Talley

court likened subsection 1 of the Washington enhancement statute to the Title VII antidiscrimination law, in that both regulated conduct and not speech. Id. at 224. Even if the regulated conduct in question--selection of a victim on the basis of his or her status--were expressive, the Talley court noted that subsection 1 would fall within at least three of the R.A.V. exceptions. Id. at 225-26. These included the "secondary effects" exception, which allows for content-based regulation of expression where the "content is not the object of the regulation." Id. at 226. "If the conduct in question can be characterized as speech, [the statute] is concerned only with its secondary effects." Id. The Talley court appears to have assumed that the R.A.V. Court applied the "secondary effects" exception to Title VII, even though it is less than clear that the R.A.V. Court made such an application. See supra note 160; see also supra note 107. See supra notes 223-31 and accompanying text for a discussion of Talley from the perspective that subsection 2 of the statute regulated speech. In this regard, it is interesting that the Talley court applied the R.A.V. exceptions to subsection 1, yet did not refer to them in examining subsection 2. See supra note 231.

Other post-Mitchell cases that rejected the R.A.V. analogy include State v. McKnight, 511 N.W.2d 389, 396 (Iowa 1994) ("We see no meaningful difference between the Wisconsin . . . and Iowa statutes . . . ."); State v. Vanatter, 869 S.W.2d 754, 757 (Mo. 1994) ("[The Missouri enhancement statute] is more like the Wisconsin statute upheld in Mitchell than the St. Paul ordinance struck down in R.A.V."); State v. Mortimer, 641 A.2d 257, 261 (N.J.) ("[The New Jersey enhancement statute] is readily distinguishable from the St. Paul ordinance . . . ."), cert. denied, 115 S. Ct. 440 (1994).

n334 Mitchell, 508 U.S. at 480-87; see also Cleary, supra note 76, at 223 ("R.A.V. stands for the proposition that every citizen has a right to think what he wants and to say what he thinks. Mitchell further defines that doctrine; laws are permissible that focus on criminal conduct as a prerequisite to punishing beliefs.").

n335 Mitchell, 508 U.S. at 482. "If convicted of criminal conduct, one is now subject to additional punishment for one's motivation, even if that motivation is a strongly held belief." Cleary, supra note 76, at 223.

n336 According to Cleary,

> there is a thin line between punishing motivation and penalizing dissenting opinion. The Court's focus . . . [in Mitchell] allows officials to use the broad justification of law and order as a subterfuge to suppress the expression of unpopular beliefs. . . . R.A.V. prohibits the direct suppression of dissenting opinion; Mitchell must not be allowed to indirectly undermine that critical holding.

Cleary, supra note 76, at 223.

n337 Professor Frederick M. Lawrence of Boston University School of Law asserted that one "'can't square the two cases . . . . [The Court] wanted to cut back what it did in R.A.V.--to put the genie back in the bottle. If you take

R.A.V. seriously, you'd have to lose all bias crime statutes. That's why you have such a quick turnaround in Mitchell.'" David E. Rovella, Attack on Hate Crimes is Enhanced, Nat'l L.J., Aug. 29, 1994, at A1, A19 (quoting Professor Fredrick M. Lawrence). "'Cross burning statutes (illegal under R.A.V.) could easily be looked at as vandalism with a penalty enhancement (legal under Mitchell).'" Id. (quoting Professor Fredrick M. Lawrence). Professor Lawrence added that any difference between R.A.V. and Mitchell is an issue of semantics. Id. It should be noted that Professor Lawrence's comments were made in August 1994, after T.B.D. I, in which a Florida appeals court used R.A.V. to strike down a cross burning statute, and before T.B.D. II, in which the Florida Supreme Court upheld the cross burning statute. See supra notes 205-16.

n338 "'The difference between R.A.V. and Mitchell is not semantics. It's real and material.'" Rovella, supra note 337, at A1, A3 (quoting Michael Lieberman, national counsel for the Anti-Defamation League).

n339 Id. at A1. By the end of 1994, 34 states had penalty enhancement legislation. Hate Crimes Laws, supra note 73, at 29.

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D. R.A.V. in Other Post-R.A.V. Contexts

1. R.A.V. and Campus Speech

Courts have applied the R.A.V. principles in contexts other than those associated with the kind of hate-crime legislation discussed above. n340 One such area involves expression within educational settings. In Dambrot v. Central Michigan University, n341 a Michigan court granted the plaintiff's motion for summary judgment and permanently enjoined a university, part of the state system, from enforcing its "discrimination harassment policy." n342 In Dambrot, the plaintiff basketball coach used the word "nigger" in addressing his players, some of whom were black. n343 The University said that the use of this term violated its policy against racial and ethnic harassment, which sought to prevent [*1171] "'any intentional, unintentional . . . verbal . . . behavior that subjects an individual to an intimidating . . . environment by . . . using symbols, epitaphs sic or slogans that infer negative connotations about an individual's racial or ethnic affiliation.'" n344 The Michigan court granted the summary judgment in part because

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n340 See supra part IV.B-C. This part discusses representative applications of R.A.V. outside of those areas previously discussed. It is by no means exhaustive of such applications.

n341 Dambrot v. Central Michigan Univ., 839 F. Supp. 477 (N.D. Mich. 1993), aff'd, 55 F.3d 1177 (6th Cir. 1995).

n342 Id. at 480.

n343 Id. at 478-79.

n344 Id. at 481 (footnote omitted) (alteration in original) (quoting Plan for Affirmative Action at Central Michigan University, section III(b)(1), Racial

and Ethnic Harassment). The plaintiff said that the use of the term was meant in a "'positive and reinforcing' manner during a closed-door locker room team session," and, thus, not in a way that was violative of the policy. Id. at 479.

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just as in R.A.V., the CMU policy confines its purpose to particular topics: race and ethnicity. Fighting words having to do with other, nontargeted topics may be used ad libitum on campus no matter how vile or harmful . . . . It therefore imposes upon a speaker the kind of "special prohibitions" [struck down] in R.A.V. n345

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n345 Id. at 483. The court made this statement under the limited construction that the policy only reached fighting words. Id. at 482.

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The Dambrot court also said that the policy engaged in the kind of viewpoint discrimination that the R.A.V. Court had denounced. n346 The court of appeals relied on R.A.V. in affirming the lower court's ruling. n347

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n346 Dambrot, 839 F. Supp. at 483 ("So long as one speaks in a way which appears, from the viewpoint of the university's enforcers, to be either positive or neutral, the speaker is on safe ground . . . ."); see also supra notes 113-17 and accompanying text. Interestingly, the Dambrot court did not consider the R.A.V. exceptions. See Dambrot, 839 F. Supp. at 483-84; see also supra notes 96-110, 313 and accompanying text. The University attempted to argue that the policy was not a speech code or statute with a penalty mechanism and, thus, was not amenable to judicial review. Dambrot, 839 F. Supp. at 481. The court rejected this argument. Id. at 481-82. The court also said that the policy suffered from other constitutional problems including overbreadth. Id. In this regard, the court posited that the policy would inhibit academic freedom. Id. at 482.

n347 See Dambrot v. Central Michigan Univ., 55 F.3d 1177, 1182, 1184-85 (6th Cir. 1995). Like the district court, the appellate court did not consider the R.A.V. exceptions. See id. at 1184-85; see also supra notes 96-110, 313, 346 and accompanying text.

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In IOTA v. George Mason University, n348 the Fourth Circuit affirmed a district court's granting of summary judgment in an action for an injunction "seeking to nullify sanctions imposed" on the plaintiff fraternity by the defendant university. n349 In IOTA, the fraternity ran a skit that it called the "ugly woman contest," in which several male [*1172] members dressed as "caricatures of different types of women including one member who dressed as

an offensive caricature of a black woman." n350 The University said that the fraternity's behavior violated George Mason's "mission statement," n351 which, by way of incorporation, served to "create a non-threatening, culturally diverse learning environment for students of all races and backgrounds, and of both sexes." n352 As a result, the University imposed various sanctions on the fraternity. n353 The court of appeals relied, in part, on R.A.V. in affirming the district court's granting of IOTA's motion for summary judgment. n354 The IOTA court said that the University punished the fraternity because its "ugly woman contest" conveyed a message that "ran counter to the views the University sought to communicate to its students and the community." n355 The IOTA court added that, because the University would not punish those whose expressive activity would further the goals of the mission statement, it engaged in the kind of viewpoint discrimination ruled impermissible by the R.A.V. Court. n356 "The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint." n357

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n348 IOTA v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

n349 Id. at 387.

n350 Id.

n351 Id. at 388.

n352 Id. at 389.

n353 IOTA, 993 F.2d at 388.

n354 Id. at 388-89. The district court ruled in 1991--one year prior to the Court's R.A.V. ruling. Id. at 388.

n355 Id. at 393 (footnote omitted). The IOTA court said that the fraternity had engaged in conduct that had expressive elements, and rejected the University's argument that it punished the fraternity strictly on the basis of its conduct without regard to any viewpoint conveyed therein. Id. at 393 n.7. It should be noted that, like Central Michigan University in Dambrot, George Mason University is part of a staterun system and, thus, is an agent of the state government. Id. at 389.

n356 Id. at 393; see also supra notes 113-17 and accompanying text.

n357 IOTA, 993 F.2d at 393. The IOTA court did not consider the R.A.V. exceptions. See id.; see also supra notes 96-110, 313 and accompanying text.

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Both Dambrot and IOTA involved university "policies" designed to curb discriminatory harassment or advance certain social goals, such as cultural diversity. n358 Unlike the R.A.V.-Vawter and Sheldon-RamseyT.B.D. classes of statutes, these policies were not speech codes in the sense that their primary objectives were to regulate certain well-defined categories of expression. n359 Still, the courts in both Dambrot and IOTA said that the policies effectively realized the outcome that the R.A.V. [*1173] Court ruled

impermissible--the imposition of viewpoint discrimination. n360

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n358 See supra note 344 and accompanying text; text accompanying note 352.

n359 See supra part IV.B.1-2.

n360 See supra notes 113-16, 346, 355-56 and accompanying text.

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Since the 1980s, anywhere between 100 and 200 universities have enacted campus speech codes that have served as "outright bans or qualified restrictions on hate speech." n361 Many universities have either abandoned, revised, or not enforced their speech codes in the wake of R.A.V. n362 One of the first applications of R.A.V. to a campus speech code occurred in 1995 when a California Superior Court judge struck down Stanford University's campus speech code. n363 The Stanford code prohibited students from "making inflammatory statements based on a fellow student's race, sex, handicap, religion or sexual orientation." n364 The superior court ruled that the Stanford code was an impermissible regulation of expressive conduct. n365 The court rejected Stanford's argument that the code targeted discriminatory conduct and only incidentally "swept up" forms of expression. n366

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n361 Schweitzer, supra note 180, at 505 n.5; see also Court Overturns Stanford University Code Barring Bigoted Speech, N.Y. Times, Mar. 1, 1995, at B8.

n362 Schweitzer, supra note 180, at 505; see also Wallace, supra note 314, at A2.

n363 Wallace, supra note 314, at A2.

n364 Id.

n365 Id.

n366 Id. For a discussion of the "sweeping up" exception, see supra notes 106-08 and accompanying text. The Stanford University situation was also different from the Dambrot and IOTA cases, in that Stanford University was a private university, and both Dambrot and IOTA involved public universities. See supra note 355; see also supra text accompanying note 342. The Stanford University plaintiff, however, sued under a new California law that "extends to students of nonreligious colleges and universities the full range of free-speech protections offered by the U.S. and state constitutions." Wallace, supra note 314, at A2. It is thought that this represented the first such law in any state. Id.

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2. R.A.V. and Access to Abortion Clinics

Several other cases involved the use of R.A.V. in unsuccessful attempts to overturn the Freedom of Access to Clinic Entrances Act of 1994 (FACE). n367 In relevant part, FACE imposes criminal and civil penalties against one who "'by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with any person because that person is . . . obtaining or providing reproductive health services.'" n368 In light of R.A.V., some have tried to argue that [*1174] FACE was impermissibly content-based because, even though "Congress could . . . have proscribed all force, threats, and obstruction," it proscribed "only those instances of force, threats, and obstruction motivated by a desire to prevent or punish access to reproductive health services." n369 Courts have responded that FACE's "language is directed at actions, not words" n370

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n367 18 U.S.C. section 248(a)(1) (1994). Congress enacted FACE during a period of heightened protests and violent confrontations at abortion clinics throughout the United States. See Hubbell, supra note 183, at 1073-75.

n368 United States v. Brock, 863 F. Supp. 851, 856 (E.D. Wis. 1994) (quoting 18 U.S.C. section 248(a)(1) (1994)), aff'd sub nom. United States v. Soderna, 1996 WL 209913 (7th Cir. Apr. 30, 1996).

n369 Id. at 863-64. This argument posits that FACE represents a content-based restriction within the proscribable category of speech called "true threats." See id; see also supra note 30.

n370 American Life League v. Reno, 855 F. Supp. 137, 142 (E.D. Va. 1994), aff'd, 47 F.3d 642 (4th Cir), cert. denied, 116 S. Ct. 55 (1995). "FACE proscribes only conduct." Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426 (S.D. Cal. 1994). "Plaintiff's reliance on R.A.V. . . . is misguided. . . . FACE is largely directed at regulating conduct . . . ." Riely v. Reno, 860 F. Supp. 693, 702-03 (D. Ariz. 1994) (footnote omitted). The Brock court held that even if FACE reached proscribable expression in a content-based fashion, it did so only incidentally and, thus, the statute would be saved by R.A.V.'s "sweeping up" exception. Brock, 863 F. Supp. at 864; see also supra notes 106-08 and accompanying text.

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3. R.A.V. and Civil Rights

Two civil rights cases illustrate further the specious applications of the R.A.V. exceptions. n371 In one case, United States v. Lee, n372 the Eighth Circuit rejected the federal government's argument that a federal civil rights conspiracy law incidentally "swept up" the expressive activity of cross burning vis-a-vis R.A.V.'s "sweeping up" exception, because cross burning "is not analogous to the examples [of treason and sexual harassment] set forth in R.A.V." n373 At the same time, in United States v. Hayward, n374 the Seventh Circuit accepted the same argument as it applied to a federal housing civil rights statute. n375 Unlike the Lee court, the Hayward court did not seem to care whether cross burning was analogous to the examples that the R.A.V. Court had cited in consideration of the "sweeping up" exception. n376

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n371 See supra part IV.B.3 for a discussion of the judicial applications of the R.A.V. exceptions.

n372 United States v. Lee, 6 F.3d 1297 (8th Cir. 1993), cert. denied, 114 S. Ct. 1550 (1994).

n373 Id. at 1302; see also supra notes 106-08 and accompanying text.

n374 United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993), cert. denied, 114 S. Ct. 1369 (1994).

n375 Id. at 1251.

n376 Id. It would seem that the relationship between the statute under review and the expressive conduct, that is, the degree to which the statute only incidentally has an impact on the expressive conduct, is more important in consideration of the "sweeping up" exception than the expressive conduct itself. See supra notes 106-08 and accompanying text.

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4. R.A.V. and Commercial Speech

Several cases have examined R.A.V.'s impact on content-based regulation of commercial speech. Commercial speech merits an intermediate level of First Amendment protection. n377 Any content-based regulation of commercial speech has been subjected to a level of scrutiny that is less stringent than the strict scrutiny that is normally applied to contentbased regulations of speech that is fully protected by the First Amendment. n378

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n377 See supra notes 33, 166 and accompanying text.

n378 See supra notes 23, 33 and accompanying text. A main difference between strict scrutiny and intermediate scrutiny is that the former requires that the contentbased statute be both necessary and narrowly tailored in order to serve a compelling state interest, see supra note 23; whereas the latter only requires that the contentbased statute be no more extensive than necessary in directly advancing a substantial governmental interest--a considerably lower standard. See supra note 33.

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The R.A.V. Court's application of strict scrutiny to a content-based regulation of an entirely proscribable category of expression n379 has presented this question: Are content-based regulations of commercial speech now rightly subject to strict scrutiny? n380

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n379 See R.A.V., 505 U.S. at 395-96; see generally supra part III.B.

n380 In his R.A.V. concurrence, Justice Stevens discussed the seemingly untenable outcome that the R.A.V. majority has given "fighting words greater protection than is afforded commercial speech." R.A.V., 505 U.S. at 423 (Stevens, J., concurring in the judgment); see also supra note 166.

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Without clear guidance from the R.A.V. Court, lower courts have not answered this question uniformly. n381 Some courts have devised a twotiered level of analysis whereby they first apply an intermediate level of scrutiny to a content-based regulation of commercial speech and, only if the regulation satisfies that standard, do they apply the more rigorous standard of strict scrutiny. n382 Some courts have demurred. n383 One court asserted that the fact that the United States Supreme Court did not [*1176] refer to R.A.V. in a subsequent commercial speech case "is extremely persuasive evidence that [intermediate scrutiny] is the correct standard." n384 In any event, this serves as yet another issue that calls for judicial clarification in the aftermath of R.A.V.

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n381 See infra notes 382-84 and accompanying text.

n382 See, e.g., Hornell Brewing Co. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993); Citizens United for Free Speech II v. Long Beach Township Bd. of Comm'rs, 802 F. Supp. 1223 (D.N.J. 1992).

n383 See, e.g., MD II Entertainment, Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994). The MD II Entertainment court said that because the statute under review did not satisfy the lesser, intermediate standard, "we need not consider whether that test, rather than the strict scrutiny of R.A.V., must guide our inquiry." Id. at 495 (footnote omitted).

n384 Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 866 F. Supp. 975, 981 (E.D. La. 1994) (construing United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993)). Because the Fifth Circuit in Greater New Orleans did not refer to R.A.V. in its decision, it appeared to answer the question on which it demurred in MD II Entertainment. See supra note 383. "Applying [intermediate scrutiny] to the facts at hand is the crux of this case." Greater New Orleans Broadcast Ass'n v. United States, 69 F.3d 1296, 1299 (5th Cir. 1995).

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V. Conclusion

In the closing portion of his R.A.V. concurrence, Justice White admonished that the majority's holding was "mischievous . . . and will surely confuse the lower courts." n385 The evidence is plain that Justice White's warning proved prescient. Since 1992, the lower courts have applied R.A.V. in ways that are arbitrary, incoherent, and, at times, selfserving. n386

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n385 R.A.V., 505 U.S. at 415 (White, J., concurring in the judgment).

n386 See supra part IV.B, D.

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Just as the Mitchell Court spoke with clarity on the constitutionality of penalty enhancement statutes, n387 the Court should now clarify its holding in R.A.V. n388 In this regard, the Court must give precise, contextual meaning to the R.A.V. prohibition against content discrimination within a larger class of proscribable expression. n389 It must recast the R.A.V. exceptions in a fashion that is clear and unambiguous, and safeguard them from specious application. n390

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n387 See supra part IV.C.

n388 See supra note 270 (noting that the Court recently declined an opportunity to reexamine the R.A.V. holding).

n389 See supra part IV.B.2, D.4.

n390 See supra part IV.B.3, D.3; see also supra notes 333, 366, 370 and accompanying text.

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In a broader sense, there are those who believe that the Court should overturn the R.A.V. holding altogether. n391 Such individuals maintain that a city or state should have the prerogative to determine which topics of proscribable hate speech impose the greatest harm to its social fabric. n392 Indeed, Justice Blackmun saw "great harm in preventing the [*1177] people of [a city] from specifically punishing the . . . fighting words that so prejudice their community." n393 Who, after all, stands better able to redress a locality's most pressing social antagonisms than those legislative authorities most able to detect them? n394 In this way, the St. Paul ordinance may have represented nothing more than a "pragmatic desire to respond directly to the most virulent and dangerous formulation of bias-motivated incitements to violence." n395 Perhaps the day will arrive when a substantially different Court joins in such a determination. Until then, the chaotic landscape that is the legacy of R.A.V. implores the present Court for some kind of reformation. The sanctity of free expression requires no less.

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n391 See, e.g., State v. Vawter, 642 A.2d 349, 360-71 (N.J. 1994) (Stein, J. concurring); Crowley, Note, supra note 179.

n392 "An interpretation of the First Amendment that prevents government from singling out for regulation those inciteful strains of hate speech that threaten imminent harm will be incomprehensible to public officials and to the citizens whose interests such laws were enacted to protect." Vawter, 642 A.2d at 371

(Stein, J., concurring). Such an argument might be considered even more fundamentalist than the argument that fighting words are intrinsically worthless, and thus rightly subject to selective proscription. See supra notes 140-46 and accompanying text.

n393 R.A.V., 505 U.S. at 416 (Blackmun, J., concurring) (emphasis added).

n394 This Note asks this question--central to the R.A.V. debate--exclusively within a rhetorical context. Compare R.A.V., 505 U.S. at 391 ("The First Amendment does not permit St. Paul to impose special, prohibitions on those speakers who express views on disfavored subjects." (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 116 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987))) with id. at 424 (Stevens, J., concurring in the judgment) ("St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm . . . to society than other threats.").

n395 Vawter, 642 A.2d at 371 (Stein, J., concurring) (emphasis added).

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LEVEL 1 - 65 OF 96 ITEMS

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NOTE: OBSCENITY LAW AND THE EQUAL PROTECTION CLAUSE: MAY STATES EXEMPT SCHOOLS, LIBRARIES, AND MUSEUMS FROM OBSCENITY STATUTES?

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SUMMARY:
... In 1957 the Supreme Court announced that "obscenity is not within the area of constitutionally protected speech or press." ... In essence, the claims raise the following question: May a state permit one institution (e.g., a public library) to distribute obscene material, and simultaneously prohibit another institution (e.g., a bookstore) from distributing the very same work? As with any equal protection challenge, courts must evaluate both the ends the states are pursuing by drawing this type of distinction, and the means chosen to achieve those ends. ... Their argument is not directly premised on the First Amendment; under Miller, the guarantees of freedom of speech and press do not extend to obscene materials and since the exemptions cover only the distribution of obscenity, a claim that the non-exempted institutions' freedom of expression was being infringed would fail. ... Those courts that have used a strict scrutiny standard have done so because they believe the display statutes implicate the exercise of fundamental rights relating to freedom of expression: the rights of booksellers to display and sell, and of adults to view and purchase, materials that are not obscene as to them. ...

TEXT:
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Introduction

In 1957 the Supreme Court announced that "obscenity is not within the area of constitutionally protected speech or press." n1 Thus it identified obscenity as a category of expression, like fighting words n2 and defamation, n3 that states may regulate without offending the First Amendment. Fifteen additional years of litigation yielded a viable definition of obscenity: "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." n4 The Court has also approved the use of a variable obscenity standard, by which states may regulate the distribution of sexually oriented materials to minors, even if the works are not obscene as to adults. n5 These decisions, however, have not solved the "intractable" n6 problems obscenity has caused the courts. Bookstore owners and trade associations continue to challenge state statutes and municipal ordinances as overbroad and unconstitutionally vague. n7

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